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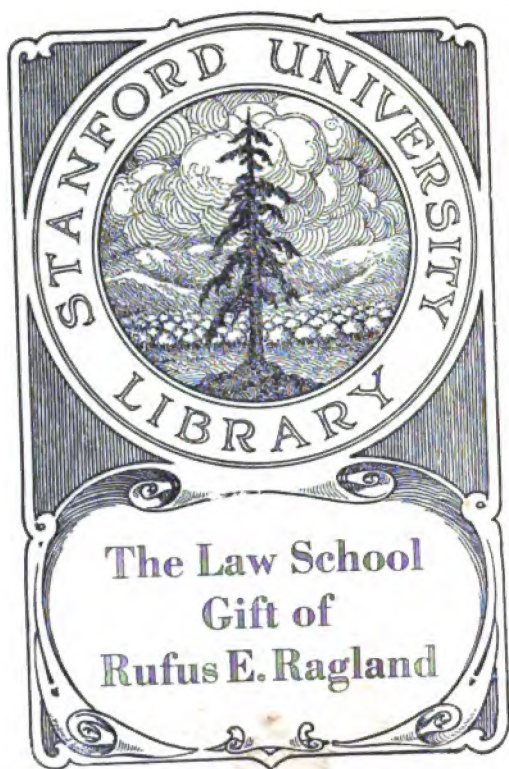
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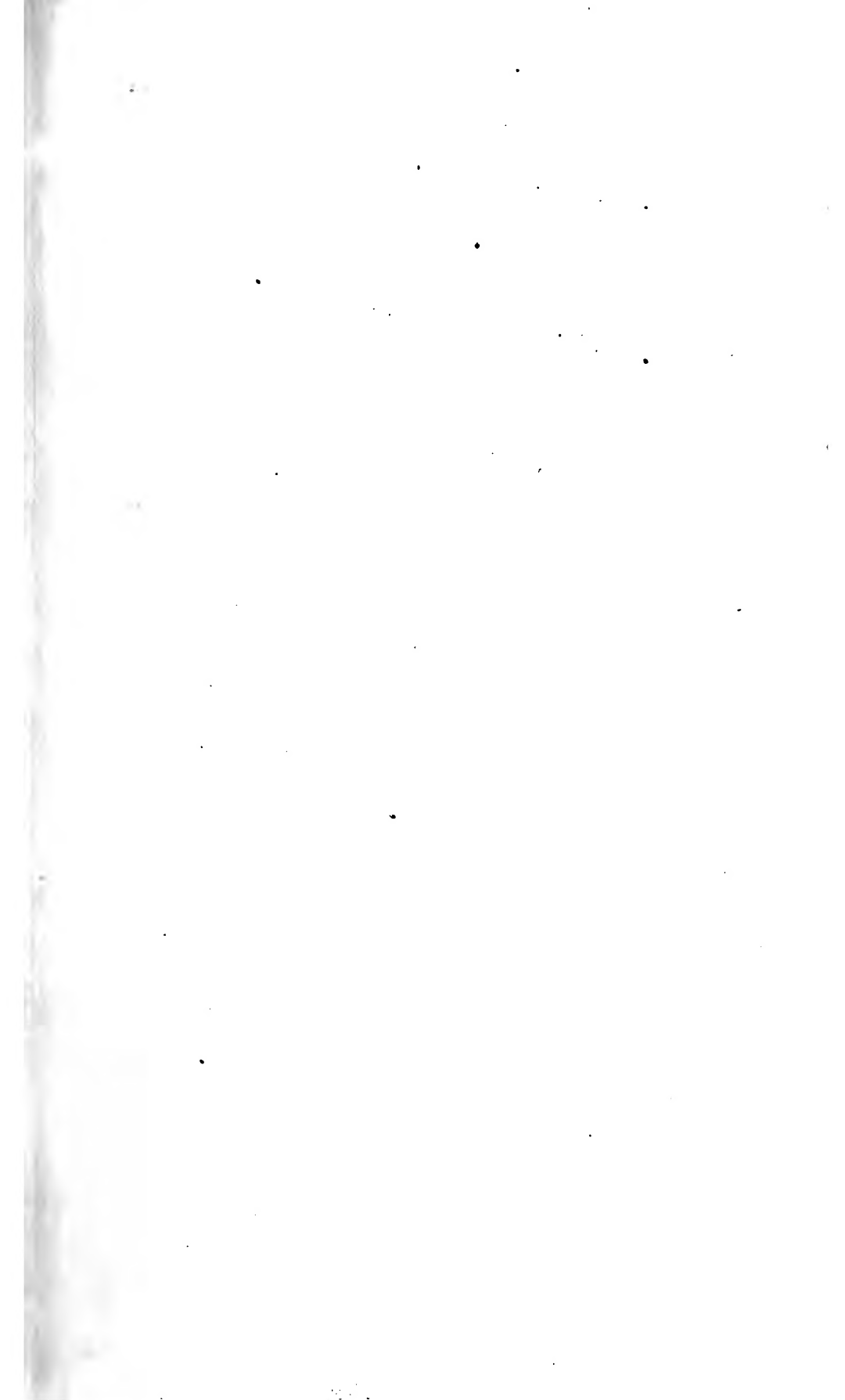
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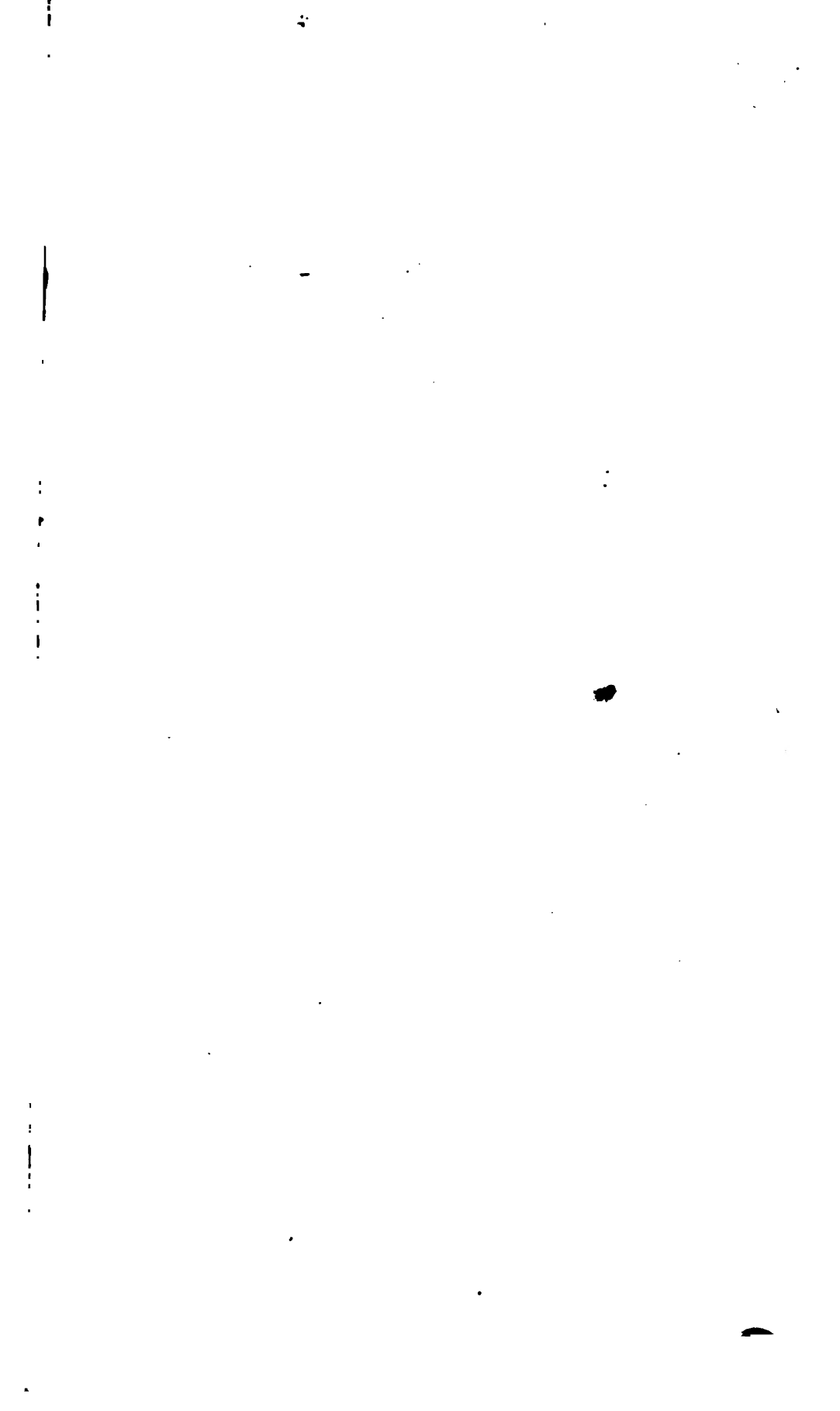


James P. Tamm

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OF
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ARGUED AND DETERMINED IN
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DURING THE TIME OF
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MASTER OF THE ROLLS.
WITH NOTES AND REFERENCES
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BY JOHN A. DUNLAP,
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SIR JOHN CAMPBELL, ATTORNEY GENERAL.

SIR ROBERT M. ROLFE, SOLICITOR GENERAL.

MEMORANDA.

SIR WILLIAM HORNE, Knt., one of her Majesty's Counsel, was appointed a Master of the High Court of Chancery, in the place of Henry Martin, Esq., since deceased.

William Russell, Esq., Barrister at Law, was appointed Accountant General of the High Court of Chancery, in place of William George Adam, Esq., deceased.

Sir William Henry Maule, Knt., one of the Barons of the Exchequer, was, in Michaelmas Term, on the death of the Right Honorable Sir John Vaughan, Knt., appointed one of the Judges of the Common Pleas, and

Sir Robert Monsey Rolfe, Knt., her Majesty's Solicitor General, was thereupon appointed Baron of the Exchequer in the place of Sir W. H. Maule.

Thomas Wilde, Esq., one of her Majesty's Sergeants at Law, was appointed Solicitor General, and afterwards received the honor of Knighthood.

George James Turner and Richard Bethell, Esqrs., were appointed her Majesty's Counsel.

James Manning, John Halcombe, William Fry Channell, William Shee, and Digby Copley Wrangham, Esqrs., were admitted to the degree of Sergeants at Law.

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ORDERS IN CHANCERY.

COURT OF CHANCERY,

9th May, 1839.

The Right Honorable CHARLES CHRISTOPHER Lord COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honorable HENRY Lord LANGDALE, Master of the Rolls, and the Right Honorable Sir LANCELOT SHADWELL, Vice-Chancellor of England, doth hereby order and direct in manner following, that is to say,—

I. THAT in all cases in which it shall be alleged that the plaintiff is prosecuting the defendant, in this court and also in some other court, for the same matter, the defendant in eight days after filing his answer or further answer to the plaintiff's bill, shall be entitled, as of course, on motion or petition, to the usual order for the plaintiff to make his election in which court he will proceed, with the usual directions in that behalf, unless the plaintiff shall, before the expiration of the same eight days, have delivered exceptions to the defendant's answer, or have referred his further answer on former exceptions. And in case the plaintiff shall have delivered such exceptions, or referred the defendant's further answer within such time, the defendant shall be at liberty, by notice in writing to be served on the plaintiff's clerk in court, to require the plaintiff to procure the Master's report on such exceptions, within four days from the service of such notice. And if the plaintiff, being so served with such notice, shall not procure the Master's report in four days accordingly, or if the exceptions shall not be allowed, the defendant shall then be entitled, as of course, on motion or petition, to the usual order for the plaintiff to elect in which court he will proceed, with the usual directions. But in either of such cases, the plaintiff shall be at liberty to move that such order may be discharged on the merits confessed in the answer.

II. THAT the plaintiff in any injunction cause having obtained the common injunction to stay proceedings at law, may (either before or after the answer of the defendant shall be put in, and whether such injunction shall or shall not have been continued to the hearing of the cause) obtain an order as of course, for leave to amend the bill without prejudice to the injunction; but that such order shall contain an undertaking by the plaintiff to amend the bill within one week after the date of the order, and in default thereof the order shall become void. And that in case the bill shall be amended pursuant to such order, the defendant shall thereupon, and although he may not have put in his answer to the bill or the amendments thereof, be at liberty to move the court on notice, to dissolve the injunction, on the ground

that the bill as amended does not, even if the amendments be true, entitle the plaintiff thereto.

III. THAT in case an injunction to stay proceedings at law shall be prayed for by the bill, and shall either not be obtained, or having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill, and the defendant shall not plead, answer or demur to the amended bill within eight days after appearance, the plaintiff shall be entitled to move for an injunction, upon affidavit of the truth of the amendments.

IV. THAT foreclosure causes when ready for hearing, may be ordered to be advanced for hearing, under the same circumstances, and subject to the same rules as other causes may be ordered to be so advanced.[1]

V. THAT in all cases in which it shall appear, that certain preliminary accounts and inquiries must be taken and made, before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff shall be at liberty, at any time after the defendants shall have appeared to the bill, to move the court on notice, that such inquiries and accounts shall be made and taken; and that an order referring it to the Master to make such inquiries, and take such accounts, shall thereupon be made, without prejudice to any question in the cause, if it shall appear to the court that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto, and that the same is consented to by such (if any) of the defendants, as, being competent to consent, have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon the statements contained in the answers of such (if any) of the defendants as have answered the bill.[1]

VI. THAT whenever any order of course obtained from the Master of the Rolls, in any cause marked for or set down to be heard before the Lord Chancellor pursuant to the General Order of the 5th day of May, 1837, shall be alleged to have been irregularly obtained, any application to discharge the same for irregularity, shall in the first instance be made to the Master of the Rolls, and such cause and all other applications to be made therein, shall nevertheless continue subject to all the regulations of the said General Order, as if this order had not been made.

COTTENHAM, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C.

[1] Vide *Lewin v. Moline*, 1 Beqv. 99.

[2] Vide *Logan v. Baines*, 10 Sim. 604. *Wilson v. Applegarth*, id. 657.

COURT OF CHANCERY.

10th May, 1839.

The Right Honorable CHARLES CHRISTOPHER Lord COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honorable HENRY Lord LANGDALE, Master of the Rolls, and the Right Honorable Sir LANCELOT SHADWELL, Vice-Chancellor of England, doth hereby order and direct in manner following ; that is to say, —

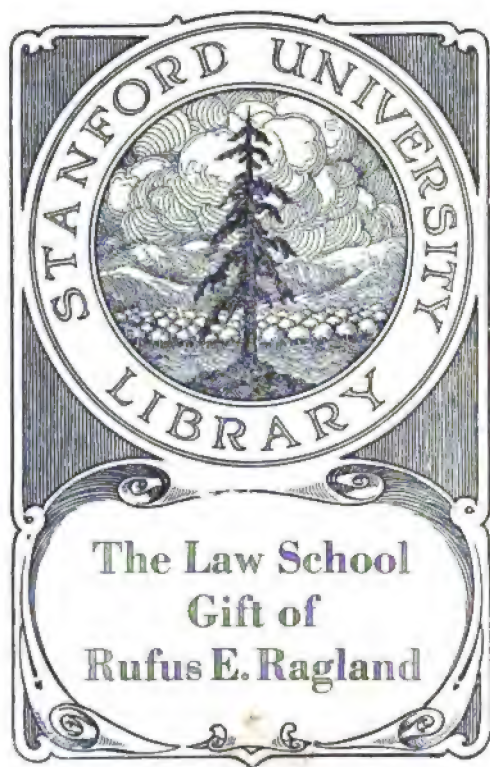
I. THAT every person, to whom in any cause or matter pending in this court, any sum of money or any costs have been ordered to be paid, shall after the lapse of one month from the time when such order for payment was duly passed and entered, be entitled by his clerk in court to sue out one or more writ or writs of *feri facias*, or writ or writs of *elegit*, of the form hereinafter stated, or as near thereto as the circumstances of the case may require.

II. THAT upon every such order hereafter to be entered, the entering clerk of this court, in whose division the same may be, shall, at the request of the party leaving the same, mark the day of the month and year on which the same shall be so left for entry, and no writ of *feri facias* or *elegit* shall be sued out upon any such order, unless the date of such entry shall be so marked thereon as aforesaid.

III. THAT such writs, when sealed, shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior Courts of Common Law belongs, and shall be executed by such sheriff or other officer, as nearly as may be, in the same manner in which he doth or ought to execute such like writs ; and such writs, when returned by such sheriff or other officer, shall be delivered to the clerks in court, by whom respectively they were sued out, or be left at their respective seats, and shall thereupon be filed as of record in the office of the Six Clerks of this Court. And that for the execution of such writs, such sheriff or other officer shall not take or be allowed any fees, other than such as are or shall be from time to time allowed by lawful authority, for the execution of the like writs issuing out of the superior Courts of Common Law.

IV. THAT if it shall appear upon the return of any such writ of *feri facias* as aforesaid, that the sheriff or other officer hath by virtue of such writ seized but not sold any goods of the person ordered to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs is payable, shall, immediately after such writ with such return shall be filed as of record, be at liberty by his clerk in court to sue out a writ of *venditioni exponas* in the form hereinafter stated, or as near thereto as the circumstances of the case may require.

V. THAT on every such writ of *feri facias* and *elegit* so to be issued as aforesaid, there shall be endorsed the words, "By the Court," and also thereunder the calling and place of residence of the party against whom such writ shall be issued, and also the name and residence or place of business of

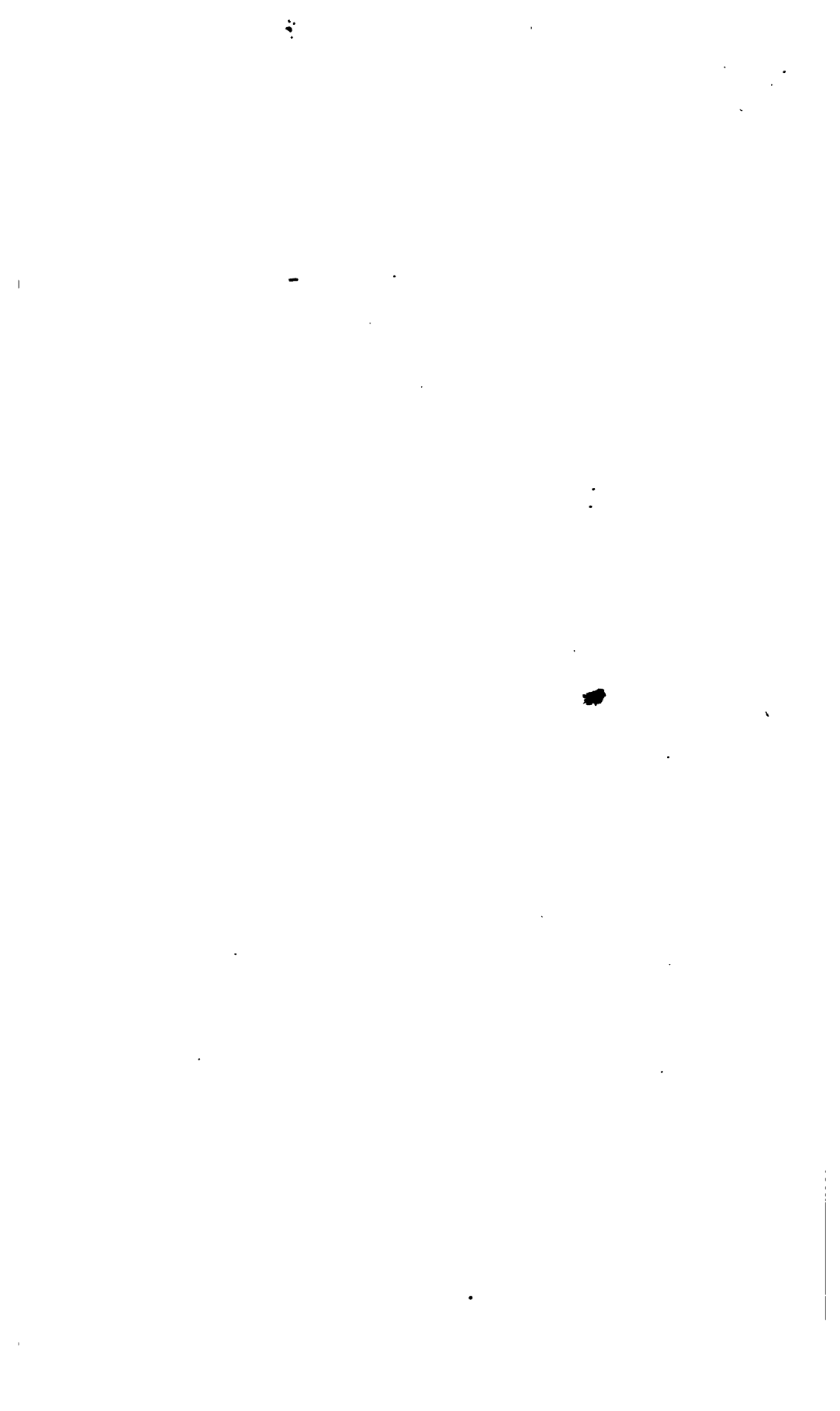


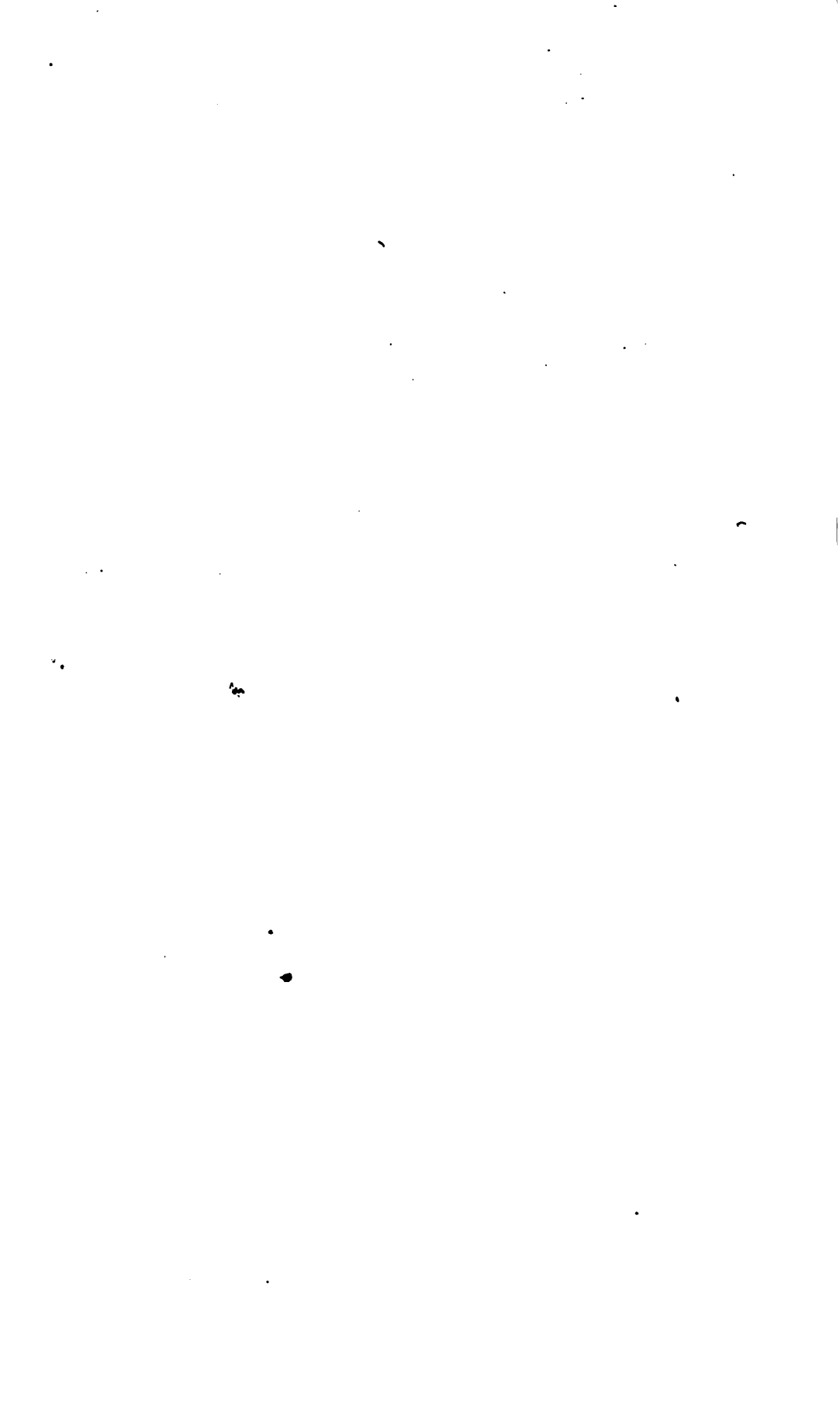
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SIR JOHN CAMPBELL, ATTORNEY GENERAL.

SIR ROBERT M. ROLFE, SOLICITOR GENERAL.

1838.—Tullett v. Armstrong.

equally between his said daughter, Ann Bradford, and his grand-daughters, Georgiana Pierpoint, and the defendant Mrs. Armstrong, by her then name of Mary Augusta Tilt, a copyhold messuage and premises, situate in Brighton Place; to hold the same copyhold premises, and the appurtenances, unto and equally between his said daughter, Ann Bradford, and his said grand-daughters, Georgiana Pierpoint and Mary Augusta Tilt, during their joint and several lives, as tenants in common; and in such manner, that neither his said daughter, nor his grand-daughter, should anticipate, sell, assign, or dispose of their several and respective life estates, so devised to them in the said copyhold premises and the rents and produce thereof; and so and in such manner, that neither any husband or husbands of his said daughter or grand-daughters, should have or acquire any right in, or control over, the life estates or interest of his said daughter or grand-daughters respectively; nor should the same be liable to the debts, control, forfeiture, or engagement of any such husband; and from and immediately after the decease of the survivor of them, his said daughter and grand-daughters, upon the trusts therein mentioned. And from and immediately after the decease of his said wife, upon trust for—and the said testator thereby gave, devised, and bequeathed unto the said Mary Augusta Tilt, one undivided moiety of a copyhold messuage or tenement, hereditaments, and premises, in East Street, Brighton; and also the entirety of a leasehold coach-house and stable on the west side of Jubilee Street, then in the occupation of Patrick Conolly, or his under-tenants, erected on a part or piece of land holden by the said testator, under lease from John Paine, for a term of ninety-nine years, as therein mentioned; and also a piece or parcel of leasehold land then used as a garden, and in the said testator's own occupation, situate on the north side of Jubilee Street aforesaid, adjoining to the said coach-house and stable, and being other part of the ground holden by the said testator, under lease from John Paine; to hold the same last mentioned premises, with the appurtenances, to and to the use of the said Mary Augusta Tilt and her assigns, during her life, subject as therein mentioned, and with such limitations or remainders over as therein mentioned: and after some other bequests, the said testator directed and declared it to be his will and intention, that the devises and bequests thereinbefore made by him to his grand-daughters, Georgiana Pierpoint and Mary Augusta Tilt, were so given and devised to them, free, exonerated from, and not subject to the rights, control, interference, debts, contracts, and engagements of any husband; and were to be taken and received by the said Georgiana Pierpoint and Mary Augusta Tilt, as if they were sole and unmarried; and so to be holden and enjoyed by them respectively.

[*4] *The testator died in 1820, leaving his wife Ann Bradford, his daughter Ann Bradford, and his grand-daughter Mary Augusta Tilt, who was then unmarried, him surviving.

On the 25th of August, 1826, Ann Bradford the daughter, made her will,

1838.—Tullett v. Armstrong.

and thereby, *inter alia*, gave and devised unto Nathaniel Bradford and Nenyon Masters Bradford, therein described, from and after the decease of the said testatrix's mother, Ann Bradford, all that the said testatrix's messuage or tenement and premises, situate in Church Street, Brighton, aforesaid; to hold the same unto the said Nathaniel Bradford and N. M. Bradford, their heirs and assigns, upon trust, that they her said trustees, or the survivor of them, or his heirs, should receive and take the rents, issues, and profits thereof, and pay the same unto her niece, the said Mary Augusta Tilt, during her natural life, so and in such manner, as that the said Mary Augusta Tilt should not sell or dispose of her life interest therein, or any part thereof, or raise or borrow money thereon, by anticipation, mortgage, or otherwise: and so and in such manner as that the rents, issues, and profits hereof, should not be subject to the right, control, or interference of any husband whom the said Mary Augusta Tilt might marry; nor be liable to his debts, contracts, forfeitures, or engagements; and the said testatrix declared, that the receipt or receipts of her said niece only, should be a good and sufficient discharge and discharges to her said trustees, or trustee, for the time being, for such rents and profits, or for so much thereof as should in such receipts be expressed to have been received; and that any sale or disposition for raising money by mortgage or otherwise, of or upon her said niece's life interest, should be from time to time null and void: and from and immediately after the decease of the said Mary Augusta Tilt, [*5] upon trust for the children of the said Mary Augusta Tilt, in the manner and for the estate therein mentioned.

After the date of the will, and on the 23d of April, 1827, the legatee, Mary Augusta Tilt, married the defendant, William Armstrong; and two days afterwards, on the 25th of April, the testatrix made a codicil, to her will, and thereby varied one devise in her will, but in other respects confirmed the same; and she died in 1827.

The widow of Nathaniel Bradford, the first testator, died in January, 1830; and then the gifts to Mary Augusta Tilt, under the two wills, took effect in possession.

By an indenture dated the 20th of March, 1832, and made between William Armstrong and Mary Augusta, his wife, of the one part, and the plaintiff of the other part, after reciting the wills of Nathaniel Bradford and Ann Bradford, in consideration of 300*l.* paid by the plaintiff to William Armstrong, they, the said William Armstrong and Mary Augusta, his wife, granted to the plaintiff, an annuity of 31*l.* 17*s.* during the life of Mary Augusta Armstrong; and Mary Ann Armstrong, in exercise of the powers, &c., given to her by the wills of Nathaniel Bradford and Ann Bradford, appointed the copyhold messuage in Brighton Place, and also her moiety of the copyhold messuage in East Street, and the leasehold house in Jubilee Street, and the freehold in Church Street, unto the plaintiff, during the life of Mary Ann Armstrong, upon certain trusts, for securing the above mentioned annuity; and William

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Armstrong thereby covenanted that he and his wife would surrender the copyholds upon the trusts aforesaid.

[*6] *A similar deed was executed in September, 1832, to secure to the plaintiff a further annuity. In January, 1835, Mr. Armstrong took the benefit of the insolvent debtors' act, and the annuities being unpaid, the plaintiff filed his bill to obtain payment thereof, out of the properties devised and bequeathed by the wills of Mr. and Miss Bradford.

A motion was made for a receiver in July, 1836, a report of which proceeding will be found in the 1st vol. of Mr. Keen's Reports, p. 428.

The case now came on for hearing.

Mr. *Pemberton* and Mr. *Teed*, for the plaintiff:—As to that portion of the property contained in the plaintiff's security, which is given to the separate use of Mrs. Armstrong simply, but as to which she is not restricted from alienation, it is perfectly immaterial whether it now stands limited to her separate use or not; for in the former case it would pass by her appointment, and in the latter it passed to her husband on the marriage, and has since been effectively conveyed by him to the plaintiff. In either view of the case, therefore, the plaintiff is entitled, as to this part of the property, to the relief he asks by his bill.

It is unnecessary, as regards the plaintiff, to consider whether property can be settled to the separate use of an unmarried woman, so as to bind a subsequently taken husband or not. There is, however, this powerful argument against it; namely, that having an unlimited power of disposition over the property before marriage, she can give it either to a stranger or to her in-

[*7] tended husband; and being subject therefore, at the time of the marriage, to all the incidents of property, the marriage itself operates as a gift to the husband; *Massey v. Parker.*(a)

The other point, which applies to the remainder of the property given by both wills, with a clause against anticipation, is not subject to any doubt. There is no discrepancy on the authorities on this point, that you cannot introduce, in the case of a man or of an unmarried woman, a general clause against anticipation. You cannot give an estate, and attach to it a condition which is inconsistent with that estate. The testator and testatrix do not, in this case, say that the legatee shall not alienate after marriage, but that she shall not alienate at all. This is a general restriction against alienation; and there can be no question on the authorities that you cannot create such a restriction, even in a gift to an unmarried woman, unless by means of a gift over on alienation. This was the express ground of the decision in *Newton v. Reid*,(b) where the Vice-Chancellor held "that the annuity not being given over upon alienation, the restrictions were void." The terms of the gift, are not that the property shall become subject to the clause against anticipation, in the event of the marriage of the legatee, but that the legatee shall be altogether restrained from assigning or charging the property. Now

(a) 2 My. & K. 174.

(b) 4 Simons, 141.

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it is clear that, notwithstanding this, an assignment by her, before marriage, would be good; this was determined by Lord Brougham in *Woodmester v.*

Walker.(a) The restriction then was not good at the death of the testator, and could not become so afterwards; if valid at all, it must be so from the beginning. If then, the testator could not annex a valid restraint in the way he has attempted, can the *court, on a contingency, create a new [*S] estate, and annex to that estate the clause against anticipation? Can the court say, that in a particular event, not pointed out by the testator, the condition shall be good, though, prior to the happening of that event, it is admitted to have been invalid? Even if an estate to the separate use could be limited to an unmarried woman, and the condition against anticipation could be annexed to it, yet that is not the effect of this will: the testator has attempted to restrict alienation generally; and this is altogether bad. This is not a clause against anticipation, attached to her separate estate, but to a general gift; this the law will not permit, except by means of a gift over; it is therefore invalid. *Brown v. Pocock*,(b) *Stiffe v. Everett*,(c) *Brandon v. Robinson*,(d) *Jones v. Salter*,(e) *Johnson v. Johnson*,(f) were also referred to.

Mr. Coleridge, for Mr. Samuel Weller, the assignee of Armstrong. It is necessary in this case, to decide, whether a gift to the separate use of an unmarried woman, is or is not valid against a subsequently taken husband and his assignees; for if the separate use clause be effectual, then the assignee under the insolvency has no interest. The defendant Weller relies on the case of *Massey v. Parker*, the decision in which case, was no more extrajudicial on this point than on the other point which was there decided. In that case, there being two objections raised on demurrer to the bill, the Master of the Rolls decided them both in favor of the plaintiff, and the demurrer was overruled in that case as much on the one ground as on the other.

Sir C. C. Pepys[1] said, "The only question therefore is, whether, [*9] where such fetters are attempted to be imposed upon an unmarried female legatee, and she marries without obtaining payment of the fund, such fetters are to operate during the coverture. Why were they inoperative before her marriage? Because they were inconsistent with the nature of her estate. Her estate and interest were therefore absolute before marriage, and the trustee held the legacy for her absolutely. She might have taken it herself or have given it to any one; and why may she not, by the act of marriage, give it to her husband? Upon principle therefore, I should not have any doubt of the right of the husband; but the very point was decided in *Newton v. Reid*, and that case was alluded to without any expres-

(a) 2 R. & M. 197. (b) 2 Russ. & M. 210. S. C. 2 M. & K. 189. 5 Simons, 663.

(c) 1 Myl. & Cr. 37.

(d) 18 Ves. 429. S. C. 1 Rose, 197.

(e) 2 Russ. & M. 208.

(f) 1 Keen, 643.

[1] It is hoped that it will not be deemed impertinent to remind the reader, that Sir C. C. Pepys, M.R. was afterwards Lord Chancellor Cottenham.

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sion of disapprobation by the Lord Chancellor in *Brown v. Pocock*. I must therefore consider the point as settled."

In *Stiffe v. Everett* the limitation was to the separate use of an unmarried daughter, without power of anticipation. The husband and wife petitioned for the transfer of the fund, the wife offering to execute any appointment. The anticipation clause was there clearly invalid; and if the property had been effectually settled to the separate use of the wife, her appointment would have passed it whether reversionary or not. The Lord Chancellor, therefore, by deciding on the ground of the property being reversionary, and on the authority of *Purdew v. Jackson*,^(a) assumed the invalidity of the separate use clause.

A gift to an unmarried woman for her separate use is a gift to her absolutely, and without restriction of any kind. Has the court any authority to alter the nature of that property on her subsequent marriage, and limit [*10] *the gift so as to exclude the legal rights of the husband? The separate use and anticipation clauses, as applied to unmarried woman, are supported upon the same principle, namely, the practice of conveyancers; but the anticipation clause having been decided to be invalid, the authority is no better in respect of the separate use clause. In *Davies v. Thornycroft*,^(b) it was argued that the separate use clause was not a restriction or fetter, but a guard: this is a mere play upon words; both the separate use and the anticipation clauses are fetters upon the legal rights of the husband.

Mr. Moore and Mr. Duppa, for trustees.

Mr. Wray, for Mr. and Mrs. Armstrong:—The case before the court is, on principle, one of extreme importance, as scarcely a settlement or will has been executed in modern times, in which the question now before the court does not arise. All wills and settlements have been framed by conveyancers on the assumption of the validity of this clause, without reference to a lady being married or unmarried; and, until the decision of *Newton v. Reid*, no doubt existed as to the validity of a gift to the separate use of an unmarried woman, without power of anticipation. The only question has been, whether such was, in reality, the intention. In *Pybus v. Smith*,^(c) Lord Thurlow said, "If it was the intention of a parent to give a provision to a child in such a way that she cannot alienate it, he saw no objection to its being done; but such intention must be expressed in clear terms."

This view of the subject was adopted by the Master of the Rolls in [*11] *Socket v. Wray*,^(d) and he almost *assumed the validity of a restraint in the case of a future coverture; for he says, in p. 487, "There is something remarkable in this case that the restraint is only during her present coverture. If she survived her present husband, the restriction was thought unnecessary; therefore, during the life of her present husband, she

(a) 1 Russ. 1.

(b) 6 Sim. 420.

(c) 3 B. C. C. 347.

(d) 4 B. C. C. 485.

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can only dispose of it by will." Sir W. Grant, in *Wagstaff v. Smith*,^(a) observes, "there are many cases in which the question has been whether the absolutely property, including a power of disposition, was intended to be given, or whether it was a personal gift without a power of disposition, and where the court has seen from the words an intention to limit her to a personal gift, without a power of disposition, the court has said, that condition might be imposed, and an interest inconsistent with it would not be effectual."

The judges in all these cases refer only to the intention, and whether it was sufficiently expressed; and they do not appear to doubt the validity of the clauses. It is erroneous to apply the same mode of reasoning to an estate given to a woman as that limited to a man. In *Beable v. Dood*,^(b) A. devised lands in trust to pay the rents and profits to his daughter (whose husband was then living) for her life, notwithstanding her coverture, and not to be subject to any control, &c., of her husband, nor liable to any debts which he had or should contract: afterwards the deviser made a codicil, taking notice of the death of his daughter's husband, wherein he ratified and confirmed his said will. The daughter was held entitled under this devise to the rents and profits, &c., free from the control of any future husband. In that case, the doubt, as stated by Willes, J., was, whether the restriction applied to her then present or to any future husband; and the judgment in that case affirmed "the proposition, that a gift to a woman, [*12] independent of any future husband, was valid: and in fact the invalidity of such a gift was never once suggested. Mr. Justice Willes, in p. 202, says—"On the whole of the will, I am of opinion that the testator meant that both his daughters should take the estate, independent not only of their present, but of their future husbands;" and Mr. Justice Ashurst said—"Taking this on the construction of the will alone, it is very clear that the testator meant that this restriction should not be confined to the present husband, because he has expressly excluded the husbands of both his daughters from any control over their respective estates; which shows a general jealousy of any husbands, and not any particular jealousy with regard to Fowler alone: and he does not even mention either of their names." Mr. Justice Buller added,—“Whatever might be the construction upon the will alone, yet, taking both the will and the codicil together, it is clear that this restriction applies to any future as well as a present husband. The names of the husbands are not mentioned. The limitation to trustees is during the life of the wife; this therefore, must extend to any husband she may ever have;" and judgment was accordingly given for the plaintiff. In the case of *Anderson v. Anderson*,^(c) the validity of a gift to the separate use of an unmarried woman came distinctly in question; and Sir John Leach granted an injunction to restrain the husband from receiving the rents of the pro-

(a) 9 Ves. 524.

(b) 1 Term Rep. 193.

(c) 2 Myl. & K. 427.

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perty given before marriage to the separate use of the wife, and from interfering with her separate estate; and this order was afterwards affirmed by Lord Eldon. At the hearing of the cause, a decree was made against the husband, for the conveyance of the property to a trustee for the wife, and for an account of the rents and profits received by him. This was an express decision both of Lord Eldon and Sir John Leach on the point.

Knight v. Knight,^(a) and *Benson v. Benson*,^(b) were decided on the ground that the restriction was, by the terms of the instruments, confined to the first coverture only; and the Vice-Chancellor, who decided these cases, admitted, in *Davies v. Thornycroft*,^(c) the validity of a trust for the separate use of a woman, married or unmarried. In *Massey v. Parker* there were two questions raised; first, whether the terms of the will were sufficiently express and unequivocal to create a gift to the separate use of the grand-daughter; and if they did, then a second question arose, whether such a trust was valid against an after taken husband and his assignees. Sir C. C. Pepys having decided against the defendant on the first point, and having determined that the property was not given to the separate use at all; the second question, namely, the validity of the limitation to the separate use, did not arise. What was said on the second point must, therefore, be regarded as a dictum. In *Stiffe v. Everett*, which was decided soon after *Massey v. Parker*, and in which the point arose, the Lord Chancellor preferred resting his decision on the reversionary nature of the property, rather than on the doctrines propounded in *Massey v. Parker*.

Mr. Pemberton in reply.—Whatever doubt may exist as to the case of *Massey v. Parker*, or on the validity of a gift to the separate use of an unmarried woman, yet on the validity of a general restriction against alienation there is no conflict of opinion, except the judgment of Sir John Leach, which was solemnly overruled by the Lord Chancellor.

If the separate use clause as applied to an unmarried woman, be effectual on her subsequent marriage, it must be on the principle that a new estate arises on that contingency. It is a new estate to arise on an event contemplated by the testator; but the question here is, whether a gift for life, with a direction against alienation wholly unconnected with any contingency of marriage, is good or bad. Now every one of the cases concur in establishing the proposition that such a limitation to an unmarried woman is totally null and void. Can there be a doubt that it is as inconsistent with her estate, as if the same estate were given to a man? Now, in *Brandon v. Robinson*, it was expressly decided that such a limitation cannot be attached to the property of a man, because you cannot separate from property its incidents. It is clear, as Lord Eldon said in that case, if you give property for life, you cannot take away the incidents of the estate; the observation applies equally with regard to a married woman. It was not without a conflict that the validity of the clause against anticipation was es-

(a) 6 Sim. 121.

(b) 6 Sim. 126.

(c) 6 Sim. 420.

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tablished in the case of a married woman ; there is no authority for extending it.

I assume, for the sake of argument, that the doctrine stated in *Massey v. Parker*, was erroneous, and that you can create a future separate estate. Has the same rule in any one case been applied to the clause against anticipation ? There may be modes by which such a condition might be annexed to the estate of a woman on her becoming covert ; but it is a very different thing to say that a general clause against alienation, made without reference to an existing or future marriage, has at any time the effect of preventing a woman from disposing of her property. The whole doctrine of separate estate rests on what the court has thought proper to ingraft on the common law ; a strange equitable doctrine, which takes every thing from the husband, and gives him nothing in return : it is founded on the pure arbitrary doctrine of this court, sanctioned by long practice. The doctrine is [*15] not to be extended ; and it is incumbent on those who seek to take away the legal rights of the husband to show some express warrant for it from former decisions.

It is not necessary, to consider, whether if the limitations were so framed as to take effect on a future marriage, the clause would be good or not ; here is a restriction not so framed ; but a general restriction, inconsistent with the absolute estate. There can be no distinction between its validity before and after marriage ; for if it be invalid before the marriage, the mere accident of marriage cannot affect it and make it good. Can the restriction shift and vary so as to be invalid before marriage, but be rendered valid by a coverture ; become suspended after the first marriage ; and again come into operation on a second ? Another reason against it is, that as a general restriction against alienation, it would be nugatory ; for it has been decided, and is now admitted, that the hour before marriage the donee might alienate.

It is clear then that it would be no protection to a woman, as she could not be prevented alienating the property. Sir John Leach's doctrine was much more consistent ; namely, that you may annex a clause against anticipation to the estate of an unmarried woman altogether ; and that marriage being a circumstance which the court would contemplate, it would place a feme sole in a different position from that of a man, and would not permit her, either when covert or discover, to do any act to defeat that which was intended for her permanent provision. This doctrine, has however been overruled, and is not now the law of the court ; and it has been decided, by a series of authorities, that you cannot annex to the estate of an unmarried woman a condition against alienation, without a gift over : [*16] the authorities concur in this. *Jones v. Salter*(a), decided by Sir W. Grant in 1815, was a gift to a woman for her separate use, without power of anticipation : the lady having become discover, a petition was presented by

(a) 2 R. & My. 208.

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her for payment of the fund, and the order was made: now this was expressly against the principle of Sir John Leach. Again, *Newton v. Reid*, was a case of property limited to the separate use of an unmarried woman, with a clause prohibiting assignment: she married, and did assign, and the assignment was held good. In *Woodmeston v. Walker*, Sir John Leach's doctrine was, that a clause of this description, attached to a gift to an unmarried woman, would on a future marriage be valid; and that it prevented any alienation, even while the lady was discover; but on appeal, Lord Brougham was of opinion that there was no foundation for the doctrine. In *Brown v. Pocock* there was a gift to the separate use of an unmarried woman, and a clause against anticipation: she made an assignment to secure an annuity, and afterwards married: on the petition of the assignee, an order for payment of the annuity was made: she subsequently, during coverture, made a second charge on the property, and a second order for payment was made by another judge. It is said, that in *Massey v. Parker*, no distinction was made between a clause against anticipation and a clause for the separate use, and that the authorities referred to by Sir C. C. Pepys do not apply to the clause for the separate use, but to the anticipation clause. Be that as it may, he concurred in the authorities which hold that the clause against anticipation cannot be attached to the estate of an unmarried woman. Sir L. Shadwell, who decided *Newton v. Reid* and *Brown v. Pocock*, held, in *Davies v. Thornycroft*, that a gift to the separate use of an unmarried woman, might take effect on a subsequent marriage; but, in the very same case in which he refers to *Massey v. Parker*, he refers to and does not disapprove of the decisions determining the invalidity of the clause against anticipation. As to the anticipation clause, the law has been settled by Sir W. Grant, Lord Brougham, Lord Cottenham, and Sir L. Shadwell, and this court cannot now reverse the many decisions which have determined the law at least on this point.

November 3.—THE MASTER OF THE ROLLS.—The plaintiff claiming to be entitled to two annuities, granted to him by the defendants William Armstrong and Mary Augusta his wife, by his bill, prays that an account may be taken of what is due to him for the arrears of his annuities; and that the same and the future payments thereof, may be paid to him, by and out of the rents and profits of the freehold, copyhold, and leasehold estates, comprised in certain indentures, dated on the 16th of March, and on the 22d day of September in the year 1832, or if necessary by the due execution of the trusts and powers of such indentures for the sale or mortgage of the same estates. The bill also prays for an inquiry, respecting an annuity alleged to have been granted by Arnistrong and wife to one James Izod; and that such annuity may be either declared to be invalid, or that if a valid incumbrance on the estates, an account may be taken of what is due in respect thereof and for further relief.

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The case is, that Nathaniel Bradford by his will, dated the 27th day of March, 1820, gave to his daughter Ann Bradford and the defendant William Gates, all his freehold, copyhold, and leasehold estates, and all his *residuary personal estate, on trust for his wife Ann Bradford for her [*18] life, and after her death upon trust, and he gave the particular property therein for that purpose described, to his daughter Ann Bradford.

And after the death of his wife, upon trust, and he gave unto and equally between his daughter Ann Bradford, and his grand-daughters Georgiana Pierpoint and Mary Augusta Tilt, a copyhold, messuage, and appurtenances in the possession of Collier, to hold unto and equally between his said daughter Ann Bradford, and his grand-daughters Georgiana and Mary Augusta, during their joint and several lives, as tenants in common, so and in such manner that neither of his said daughter and grand-daughters might anticipate, charge, sell, assign, or dispose of their several and respective lives, or life, estates or estate so devised to them, of or in the aforesaid copyhold premises, and the rents and produce thereof; and so and in such manner, that neither any husband or husbands of his said daughter or grand-daughters might have or acquire any right of or in, or control over, the life estates or interests of his said grand-daughters respectively, nor should the same be liable to the debts, contracts, forfeitures, or engagements of any such husband: and he declared and directed that the receipt and receipts of his said daughter Ann Bradford, and grand-daughters Georgiana and Mary Augusta, should from time to time be good and effectual discharges for the money therein expressed to be received; and after the decease of the survivor of his daughter and grand-daughters, he gave over the property so devised to them for life; and after devising a moiety of a copyhold tenement on the east side of East Street, in Brighton, he gave after the death of his wife, unto his grand-daughter Mary Augusta, the other moiety thereof; and also the entirety of certain leasehold premises in his will particularly described, to hold *to Mary [*19] Tilt for her life, with remainder to her children; and he gave the residue of his personal estate unto and equally between his daughter Ann Bradford and Henry Tilt, Georgiana Pierpoint, and Mary A. Tilt, absolutely as tenants in common, and he declared, that all or any of the bequests and devises before made to his grand-daughters Georgiana and Mary A., not before bequeathed and devised to them, exclusive of any husband, were so given and devised to them free, clear, and exonerated from, and not subject to, any husband's rights, control, interference, debts, contracts, and engagements, and were to be taken and received by them respectively, as if they were sole and unmarried, and so held and enjoyed by them, that their several receipts should be good and effectual discharges; and he appointed his daughter and William Gates executrix and executor of his will.

The testator died in October, 1820, leaving his wife Ann Bradford, and his grand-daughter Mary Augusta Tilt, in his will called Mary Tilt, surviving him.

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The whole of his property became vested in his wife for her life ; subject to that life interest, the testator gave a portion of it to his grand-daughter Mary Augusta for her life, for her separate use, and he intended that the interest which he gave to her in a copyhold messuage, constituting part of the property, should be vested in her without power of anticipation.

When the testator died, the grand-daughter Mary Augusta was unmarried ; and it has been argued, that as she was not married at the time of the testator's death, when the gift became vested in her, the limitation to her separate use is not effectual ; and secondly, that if that limitation can be sustained, the restraint upon it, "forbidding her to dispose of it in anticipation, is void, because it is not accompanied by a gift over in the event of an attempt to alienate.

On the 25th of August, 1826, Ann Bradford, the daughter of the first testator, made her will, and she thereby *inter alia*, and subject to her mother's life interest, gave to her trustees, Nathaniel Bradford and Nenyon Masters Bradford, a certain messuage in Church Street, Brighton, upon trust to receive the rents and pay the same to her niece Mary Augusta Tilt for her life, "so and in such manner as the said Mary Augusta Tilt should not sell or dispose of her life interest therein, or any part thereof, nor raise or borrow money thereon by anticipation, mortgage, or otherwise, and so and in such manner that the rents, issues, and profits thereof, should not be subject to, but exclusive of, any husband's (which the said Mary Augusta Tilt should marry) right, control, or interference, nor should the same be liable to his debts, contracts, forfeiture, or engagements ; and she declared that the receipt or receipts of her said niece only should be a good and sufficient discharge and discharges to her trustee or trustees, &c. ; and that any sale or disposition for raising money by mortgage or otherwise, of and from her said niece's life-interest, should be from time to time null and void." And after her death the said testatrix gave the same premises to the children of Mary Augusta Tilt, and she appointed her trustees executors of her will.

After the date of this will, and in April, 1827, the legatee Mary Augusta Tilt married the defendant William Armstrong, and two days afterwards, viz. on the 25th of April, the testatrix made a codicil, and thereby [*21] varied one devise in her will ; but in other respects confirmed the same, and she died in the month of October following.

Mary Augusta Armstrong, the legatee, being married at the death of the testatrix, when the gift under her will became vested, it is not denied that the gift to her separate use might take effect, but it is argued that the restraint upon alienation is inoperative, because there is no gift over upon the attempt to alienate.

In January, 1830, the widow of Nathaniel Bradford, the first testator, died, and then the gifts under the two wills took effect in possession.

In March, 1832, Armstrong and wife having sold an annuity of 31*l.* 17*s.* to plaintiff for 300*l.*, executed a conveyance and assignment of Mrs. Arm-

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strong's life interest to the plaintiff to secure payment of the annuity; and a like deed was executed in the following month of September, to secure to the plaintiff an annuity of equal amount.

The annuities were paid up to some time in the year 1834; but in January, 1836, Armstrong took the benefit of the insolvent debtor's act, and thereupon the plaintiff filed this bill to enforce payment of the annuities.

In this court a married woman has, for more than a century, been considered as capable of possessing property to her own use, independently of her husband; such property is called her separate estate, and, in respect of it, she is considered as a feme sole, enjoying, and capable of exercising, her rights as such.

The property may be acquired, either by contract with the husband before the marriage, or by gift from *him, or from any stranger wholly [*22] independent of such contract; so far as his legal rights as husband may interfere, the court will treat him as a trustee; and property held by or for the wife to her separate use, if unaccompanied by any restraint, is subject to her power of alienation, and the other incidents of property held by men or single women.[1]

The estate for separate use, as sanctioned by courts of equity, has its peculiar existence only in the married state. It operates as a protection to a married woman, against the legal power over the wife's property which is vested in her husband. It acts in contravention and control of the legal right of the husband, and as against his legal power it is a sufficient protection; but the power of alienation remaining in the wife, the separate estate, unfettered, is no protection against the moral influence of the husband, and many instances have occurred and daily occur in which the wife, under the persuasion or influence of her husband, has been and is induced to exercise her power of alienation in his favor or for his benefit, and thus defeat the protection intended for her.

But as the separate estate itself, owed its origin and support to the courts of equity, it was understood, that the same courts might so modify it, as to secure the protection which was intended; and accordingly it was intimated by Lord Thurlow, that if a gift clearly expressed, that the separate estate should be incapable of assignment in anticipation or of alienation, that intention would be carried into effect, and his Lordship being of that opinion, himself set the example in a case in which he personally took an interest; and from that time, now nearly half a century ago, it has been usual to introduce into wills and settlements a clause giving to women real and personal estate for their separate use, *independently of their hus- [*23] bands, without power of assignment, by way of anticipation or of alienation; and such clauses, though their operation has been considered to be, as undoubtedly it is, anomalous and irreconcilable with the ordinary

[1] Vide *Simons v. Horwood*, 1 Keen, 7; *Tawney v. Ward*, post, 568; *Shirley v. Shirley*, 9 Paige, 363; *Scott v. Davis*, 4 Myl. & Cr. 89; Amer. Ch. Dig., Husband and Wife, VIII.

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legal rules, affecting the limitations of estates, and the legal incidents of property, have been repeatedly approved and carried into effect by this court, and settlements and provisions for families to a very great extent have been framed in reliance upon them. And in *Jackson v. Hobhouse*,^(a) Lord Eldon emphatically declared, that it was too late to contend against the validity of a clause in restraint of anticipation.[1]

I apprehend that the restrictive clause or fetter, (as it has been called,) has in this court, always been considered, as affecting a modification of the separate estate, and consequently, to have its operation only in the married state. It is said, indeed, that before the case of *Brandon v. Robinson* there were some eminent lawyers, who considered that a similar fetter might be imposed by this court, on property enjoyed by men and without relation to the married state; but, Lord Eldon, in deciding that case, after referring to Lord Thurlow's reasoning, that this court, having by its doctrine of separate estate enabled a woman, though married, to alien, might limit her power over it, thought it proper to state distinctly, that the case of a disposition to a man, who, if he has property, has the power of aliening, was quite different; and I conceive, that the validity of a clause in restraint of alienation, when clearly expressed, in connection with a clause giving the estate for the separate use of a married woman, also clearly expressed, has not till lately been doubted.

[*24] *As the clauses conferring the separate estate, and annexing the fetter, have both of them their effective operation, only in the state of marriage, and are intended for the protection of married women, and not to restrain the incidents of property vested in persons under no legal incompetency, it has been determined, that neither of them has any practical operation whilst the donee is single; it has been considered that, as an unmarried woman is as capable of enjoying and exercising the rights of property as a man is, the property must in her, whilst unmarried, be accompanied by its ordinary incidents, and upon this principle would seem to be founded the several cases of *Jones v. Salter*, *Barton v. Briscoe*, *Woodmeston v. Walker*, *Brown v. Pocock*.

In the three first of these cases, the alienation took place during widowhood, i. e. after the termination of a coverture. In the last, the alienation took place before coverture. In the cases of *Woodmeston v. Walker* and *Brown v. Pocock*, the Lord Chancellor reversed orders of Sir John Leach, who was of opinion, that an estate given to the separate use of a woman

(a) 2 Mer. 488.

[1] That an unconditional gift of a chattel or a chattel interest to a feme covert is subject to the marital right of the husband, see *Hewitt v. Lord Dacre*, 2 Keen, 622, 630. *Shirley v. Shirley*, 9 Paige, 363. If a feme covert who has a separate estate, purchases articles of furniture with the rents and profits of such estate, and puts them into the possession of her husband, without any agreement or understanding with him that he shall hold them as her trustee, or that the title shall be vested in any other person for her separate use, the articles thus purchased become the property of her husband, and are liable to be sold for his debts. *Shirley v. Shirley*, ubi sup.

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independent of any husband she might marry, and accompanied by the fetter, prevented her from alienation when single, the intention having been, to secure to her the enjoyment of separate property during coverture, and coverture having therefore been in the contemplation of the donor, and being possible on the part of the donee, Sir John Leach considered, that she was not at liberty to defeat that intention, by any act of her own when single; his opinion was overruled, and the point does not arise in any of the cases before me. Supposing it to be satisfactorily established, that a woman may, when single, dispose of property given to her for her separate use without power of alienation, none of these cases would be affected by it.

*But it has been argued, that if the gift of property for the separate [*25] use of a woman, whether intended to be thus fettered or not, becomes vested in the woman whilst single, she then possesses immediately the faculty of disposition or the power of alienation; and that, if she afterwards marries, she by the fact of marriage subjects this, like any other property, to the marital power of the husband, and in that way, loses all the protection she was intended to have; and in the arguments which have been used on this subject, a desultory or shifting privilege or fetter attaching on the marriage, and of no practical operation when the woman is discovered, has been treated as a sort of absurdity not to be endured.

I confess, however, that I see no absurdity, but considerable convenience, in a law affording peculiar protection to the property of married women; which affords to women protection, or imposes upon them restraint, for their protection, only when they want it; which enables a woman when single and adult, upon deliberation, to settle her property according to her convenience, or, if most to her advantage, to forego her protection altogether; and yet, guarding against infancy or improvidence, secures her the protection when married, if she has not deliberately and designedly renounced it before the marriage took effect.

And it appears to me, that this court has not considered, that the woman by the fact of marriage, subjects an estate given to her for her separate use, to the marital power of her husband.

In *Lady Strathmore v. Bowes*, (a) Lord Thurlow puts this case: "Suppose a relation had given her 10,000*l.* for *her sole and separate [*26] use; if she had represented it as her own absolutely, so that upon a marriage it would have gone to her husband, this court would have compelled the trustees to give it to her husband, but not otherwise." It is therefore clear, that Lord Thurlow did not think, that the woman by her marriage gave her separate estate to the husband; for looking at her situation before marriage, he distinguished between property given to her sole and separate use, which the court would protect from the marital power. Moreover, many cases have occurred, in which property has been given to women, for their sole use, independent of any husband; and in which the court has had

(a) 1 Ves. jun. 27.

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to declare the rights of such women to the property, when they were single, and, consequently, whilst they had the power of alienation; if in such circumstances, the separate estate meant nothing, all that would have been proper would have been, to declare the woman entitled to the property without more; but the declarations have been that the women though single at the time were entitled to their sole and separate use,^(a) and on the marriage of a ward, the court has ordered the property to be settled for her separate use during life, which would have been useless, if a widowhood put an end to that species of estate.

But the question came directly under the consideration of the court in *Anderson v. Anderson*. Leasehold property was given by will to a woman, then single, to her own sole use, free of the control of any present husband, or any husband to come. The woman was single at the testator's death, and for several years afterwards. Before she married, she desired to have this property settled to her separate use; the intended husband refused, [*27] and the marriage took place without a settlement. *After the marriage, the wife claimed the same property for her separate use; and, although the husband insisted, not only, that a gift to the separate use of an unmarried woman was insensible, as an attempt to limit her power of disposition, but that in this case there was an agreement to waive her claim, it was determined, that she was entitled to the leasehold for her sole and separate use. This was the decree of Sir John Leach, who had, in a previous stage of the cause, granted an injunction, to restrain the husband from receiving the rents; and his order, in that respect, was confirmed by Lord Eldon, before whom a motion to dissolve the injunction was made.

Unfortunately, this case was not reported, till the orders upon which the questions now arise had been made; but up to November, 1822, when the decree in *Anderson v. Anderson* was pronounced, it seems to have been considered as quite clear, that a gift to a woman for her sole and separate use, independent of any husband, conferred upon her a separate estate during her marriage although she might be single when the gift vested in interest or in possession. The separate estate was considered simply as an estate vested in a woman, which this court would protect against the marital power of her husband, and no question had been raised, as to the validity of a restraint upon alienation affecting the separate estate. And according to the law, thus understood, has been the constant practice of the profession, and there are very many cases in which married women, and through them their families, owe their sole support to provisions made for them on this understanding.

If the gift were so limited as to confer a separate estate during a [*28] particular coverture only, this court did *not extend it further; and the case of *Benson v. Benson* (b) is in conformity with that principle.

(a) See *Clayton v. Gresham*, 10 Ves. 287.

(b) 6 Sim. 126.

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The cases which have raised the question are *Newton v. Reid*, *Massey v. Parker*, and *Brown v. Pocock*.

The orders in *Newton v. Reid* and *Brown v. Pocock* (which is the second case of the same name) were made by the Vice-Chancellor, as it would seem, without any argument. In each case, property was given to the woman for her separate use, without power of assignment by way of anticipation; and alienations were made during coverture. In the first case, the Vice-Chancellor is reported to have said, at the time, that the restrictions were void, because the annuity was not given over upon alienation; and subsequently, (a) "that the restriction on alienation was rendered ineffectual by the context of the will." In the other case, no reason whatever is assigned by the judge, though the reporter has transferred an observation of counsel to his marginal note; (b) but, on a subsequent occasion, (c) the Vice-Chancellor is reported to have said the cases of *Barton v. Briscoe*, and *Newton v. Reid*, proceeded on this, "that the policy of the law being in favor of the power to assign, the courts will not permit that power to be restrained by a fetter which is to take effect on a subsequent marriage." Upon this, it is necessary to observe that, in *Barton v. Briscoe*, the alienation was made during widowhood, whilst, in *Newton v. Reid*, the alienation was made during coverture.

In the case of *Massey v. Parker*, it was a question whether the property was given to the separate use of *the wife; if it were so given, [*29] no fetter was imposed upon it, and in that respect it differs from this case; and the Lord Chancellor, then Master of the Rolls, having determined, that the estate was not given to the woman for her separate use, the case might there have ended, but his Lordship proceeded to declare his opinion, that if the property, had been given to the woman's separate use, it would upon the marriage, have become the property of the husband.[1]

(a) 6 Sim. 131.

(b) 5 Sim. 663.

(c) 6 Sim. 423.

[1] Lord Cottenham, in his judgment upon the appeal in the principal case, speaks of his own decision, when Master of the Rolls, in *Massey v. Parker*, which he vindicates with modesty and ability. He says, "I now come to the case of *Massey v. Parker*, which excited an interest to which it was very little entitled, either from the authority of the judge or from any novelty in the doctrine. What was said upon this subject in that case has been represented as extra-judicial by some, and as a decision upon the point by others. It certainly was not extra-judicial; because it was one of the questions directly in issue, and upon which the decision might have been rested. But it is, at the same time, true that there being another point in the case sufficient, in my opinion, to support the judgment I pronounced, it cannot be said that the point in question was that upon which the judgment was founded, and for that reason, less attention was, perhaps, paid to the various considerations belonging to it than it was entitled to, and less than it probably would have received if the rights of the parties had depended upon the determination of it; and I must observe, that although the cases favorable to the proposition of which approbation was expressed, were fully brought before me in the argument, none of those which were most important on the other side were referred to. It had, at that time, been decided that it was equally incompetent to affix to a gift to a single woman, as to a man, restrictions inconsistent with the estate given, and that in such cases the woman, before marriage or upon becoming discover by the death of her husband, had the absolute property in the fund; not in the case of either a male or a female, that there was a power of relieving the property from the qualification and restriction imposed upon it, but that such qualification and restriction were void, and the title to the property absolute. It certainly

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As the validity of the restraint upon alienation, appears to me, to depend upon the existence of the separate estate, it is not to be disguised that the case of *Massey v. Parker*, if considered as an established decision, whilst it negatived the existence of the separate estate, in such a case as the present, would also put an end to the restraint on alienation; and it must be admitted, that the case of *Newton v. Reid*, though the order was made without argument or opposition, has been more than once referred to without any disapprobation.

In the subsequent case of *Davies v. Thornycroft*,^(a) the Vice-Chancellor has expressed himself to have always understood that property might be given to the separate use of a woman married or unmarried, and has stated, I conceive correctly, that the practice of the profession has been, according to that opinion, without any variation; and in the same case he has stated, also I conceive correctly, that the cases of *Newton v. Reid*, *Barton v. Briscoe*, *Jones v. Salter*, *Woodmeston v. Walker*, and *Brown v. Pocock*, were all cases in which the question was whether, if the court admits property to be settled to the separate use of a woman, it will also admit [30] *of her being restrained from disposing of it; but to this statement it is most important to add, that the cases of *Jones v. Salter*, *Barton v. Briscoe*, *Woodmeston v. Walker*, and the first case of *Brown v. Pocock*, only show, that the court does not admit of such restraint, whilst the woman is single; whilst the case of *Newton v. Reid*, and the second case of *Brown v. Pocock*, are the only reported cases, in which, notwithstanding the fetter annexed to the separate estate, the court has permitted alienation during coverture.

In the result of the cases to which I have last adverted, it appears to have been the opinion of the Lord Chancellor, when Master of the Rolls, that the separate estate could not arise upon coverture, if the subject of it vested in the woman when single; and it appears to be the opinion of the Vice-Chancellor, that the separate estate would arise upon coverture, although the subject of it vested in the woman when single, but that the court would not sanction any restraint upon alienation annexed to such separate estate.

In this state of the authorities, I own that I have found myself greatly embarrassed, and I could have wished to have this case re-argued before the Lord Chancellor and in the presence of the Vice-Chancellor; not finding

did not occur to me, as it does not appear at that time to have occurred to any one else, that the subsequent estate could survive into a subsequent coverture, stripped of the protection which the prohibition against anticipation gives to it, and which alone, in many cases, prevents it from being an evil rather than a benefit to the wife. I cannot, therefore, think that there was any inaccuracy in saying that I must consider the point as settled. Whether the expression of approbation of the doctrine so established was well founded is what I have to consider in the present case. That the expressions used in that case were not considered as promulgating any new doctrine may be inferred from cases to which his Lordship then proceeds to allude. *Tullett v. Armstrong*, 4 Myl. & Cr. 397, 398.

(a) 6 Sim. 420.

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that course approved of, I have given the subject the best attention in my power, and though, after what has passed, I must hold my opinion with great distrust, yet as it does appear to me, that the opinion expressed in *Massey v. Parker*, is not consistent with the decision in *Anderson v. Anderson*, and that the orders in *Newton v. Reid*, and the second case of *Brown v. Pocock*, are not warranted by the former practice and doctrines of the court, I cannot refuse *to the parties the statement of my opinion, [*31] such as it is.

I have considered all the cases which I have been able to find on the subject, and I am unable to find any authority prior to those which I have mentioned, or any satisfactory principle for the proposition, that a gift to a woman for her separate use, is nugatory, if she chances to be single, at the time when the subject of the gift becomes vested in her; or for the proposition, that the restraint upon alienation of separate estate is nugatory, if not accompanied by a gift over upon an attempt to alienate.

To sanction either of these propositions, would, as it appears to me, defeat the object and purpose which were contemplated by this court, when it applied its principles of equity to the support of the separate estate of married women.

As this subject has given occasion to considerable discussion, and as a decision pronounced here cannot settle the question, which is of very great importance, I am desirous that the case should be brought under the consideration of a higher tribunal, without any unnecessary delay, and to afford every facility in my power for the correction of any error into which I may have fallen.

I therefore think it right to state, that it appears to me, as the result of the authorities, and of the constant practice of conveyancers, which great and eminent judges have considered to be no mean evidence of the law :—

*That property given to a woman for her separate use, independent [*32] of any husband, may, under the authority of this court, be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discoverd.

That, in respect of such separate estate, she is by this court considered as a feme sole, although covert. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this court for her protection.

The words “independent of a husband,” whether expressed or implied in the terms of the gift, mean no more, than that this court will not permit the marital power of the husband to be used, in contravention of the enjoyment of the property, according to the terms of the gift.

If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate independent of her husband.

If the gift be made for her sole and separate use, without power to alienate,

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she has, during the coverture, the present enjoyment of an unalienable estate, independent of her husband.

In either of these cases she has when discover a power of alienation: the restraint is annexed to the separate estate only, and the separate estate has its existence, only during coverture; whilst the woman is discover, the [*33] separate estate, whether modified by *restraint or not, is suspended and has no operation, though it is capable of arising upon the happening of a marriage.

The restriction cannot be considered distinctly from the separate estate of which it is only a modification; to say that the restriction exists, is saying no more than that the separate estate is so modified; the donor in giving the woman when married, some of the faculties of a *feme sole*, has withheld the power of alienation; under the terms of the gift, and by the aid of this court, the woman is a *feme sole*, as to the present enjoyment of the property, but no further; measuring her faculty by the terms of the gift, she is not a *feme sole* as to the disposition of her property in anticipation of her intended provision. If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does exist without the restriction, but the restriction has no independent existence; when found, it is as a modification of the separate estate, and inseparable from it.

And applying these principles to the present case, I am of opinion, that as to those estates, which by the wills of the testator Nathaniel Bradford, and the testatrix Ann Bradford, were given to the defendant Mrs. Armstrong, for her separate use, without power of alienation, the plaintiff has acquired no right under his securities. As to the estates given by the will of Nathaniel Bradford to Mrs. Armstrong for her separate use, without any clause to restrain alienation, I think the plaintiff is entitled to the relief he prays, and the accounts and inquiries must be directed accordingly.[1]

[1] Affirmed by Lord Cottenham, January 22, 1840; 4 Myl. & Cr. 377, 392. As to the proceedings on that part of the order which directed an account, see S. C. 4 Beav. 319; see further the three following cases, also 1 Keene, 435, n. 1. 1 Sim. & Stu. 432, n. 1. *Newlands v. Paynter*, 4 Myl. & Cr. 413. S. C. 10 Sim. 377, 380, and n. 1, *ibid.* A female infant entitled to a legacy of stock given in trust, to be accumulated till she should attain twenty-one, and to be then transferred to her for her separate use, does not transfer her interest in such legacy, to her husband, by the act of marriage; and if married at the time when she attains her majority, she takes an absolute interest in the legacy for her separate use. *Johnson v. Johnson*, 1 Keen, 648.

1838.—Scarborough v. Borman.

*SCARBOROUGH v. BORMAN.

[*34]

1838; July 9, November 3.

A testator bequeathed a sum in trust, for his daughter, then and at his death a widow, for her separate use. After the death of the testator she married: Held, that her husband acquired no interest in the fund.

THIS bill was filed by James Scarborough against William Borman, (a trustee,) and against the plaintiff's wife and her three children by a former marriage.

The bill stated that Thomas Smith; by his will, dated on or about the 2d of June, 1820, amongst other things gave and bequeathed unto Thomas Marris and William Borman, their executors, administrators and assigns, the sum of 1500*l.* to be paid to them within six months after his, the testator's decease, by his executor thereafter named, upon and for the trusts, intents and purposes thereafter expressed and declared, of and concerning the same (that is to say:) upon trust, that they, the said Thomas Marris and William Borman, or the survivor of them, or the executors, administrators or assigns of such survivor should forthwith, upon the receipt thereof, put and place out the same at interest upon government or real security, and should, from time to time, alter and vary the same at their or his discretion; and also during the life of his daughter, Frances Brown, then the widow of George Brown, late of Thorganby, in the city of Lincoln, tanner, pay the interest, dividends and produce thereof, when and as the same should be paid, into her own hands for her sole, *separate* and exclusive use and benefit, and exclusive of, and without being in any wise subject, or liable to the debts, intermeddling, or control of any future husband. And the testator declared it to be his will, that the receipt and receipts in writing of his said daughter should, notwithstanding any future coverture, be a good and sufficient *discharge, and good and sufficient discharges for the said [*35] interest and dividends, or so much thereof as in such receipt or receipts respectively, should be expressed or mentioned to be received; and from and after the decease of his said daughter, Frances Brown, then upon this further trust, that they, his said trustees, or the survivor of them, or the executors, administrators or assigns of such survivor, should call in the said sum of 1500*l.*, and pay and divide the same to and amongst all and every the children of his said daughter, Frances Brown, then, or thereafter lawfully to be begotten, when and as they should severally attain their respective ages of twenty-one years.

That the testator departed this life on the 5th of June, 1820, and shortly after his death, his executor transferred the sum of 1500*l.* to Marris (since deceased,) and Borman upon the trust aforesaid.

In 1832, Frances Brown who, up to that time, had continued a widow, intermarried with and became and was the wife of the plaintiff.

The bill suggested certain breaches of trust as to the trust fund, and

 1838.—Clark v. Jaques.

prayed, that the plaintiff might be declared entitled, in right of his wife Frances Scarborough, under the will of the said testator, to the interest of the sum of 1500*l.* during the lifetime of his wife, and all arrears thereof; and it prayed for an account thereof, for consequential directions.

To this bill the defendants filed a general demurrer.

Mr. *Kindersley* and Mr. *Jemmett*, in support of the bill.

[*36] *Mr. *Pemberton* and Mr. *Sidebottom*, for the demurrer.

November 3.—THE MASTER OF THE ROLLS, after stating the circumstances of the case:—This case was not argued, but both parties concurred in desiring the case to be decided upon the argument in *Tullett v. Armstrong*, and in representing that the only question was, whether the woman was entitled to separate estate, when the subject became vested in her when single. I am of opinion that she is so entitled, and on that ground allow the demurrer, unless the counsel for the plaintiff should think that, notwithstanding that opinion, the bill can be sustained, as seeking to secure the fund for the benefit of any children of the present marriage.[1]

CLARK v. JAUQUES.

1838; August, September 5.

An annuity was bequeathed to a lady, who was unmarried at the death of the testator, for her separate use, independent of any husband with whom she might at any time marry, and without power of anticipation. After the death of the testator, the legatee married, became a widow, and contracted a second marriage. No disposition having been made by her while discreet: Held, that the separate use and anticipation clauses attached to the annuity during the second marriage.

THIS case came before the court upon a petition presented by Richard Hitchcock and Sarah Grace his wife, which stated that William Clark, by his will, dated the 25th of October, 1822, among other things, gave and bequeathed the residue and remainder of his personal estate and effects unto Thomas Williams and John Jaques, upon trust, from and out of the yearly dividends and annual profits thereof, to pay and apply to and for the [*37] use of the said Sarah Grace Hitchcock, ("therein called Sarah Grace Brown, spinster, daughter of Mr. George Brown,) for her own use and benefit, for and during the term of her natural life, the yearly sum of 50*l.* sterling: and the testator declared it to be his will, that the said annuity should be for the *separate use* of the said annuitant, and not subject to the debts or control of any husband, with whom she might happen to be married, at the time of the said testator's decease, or at any time afterwards; and that the receipt, or receipts of the said Sarah Grace Hitchcock, should be

[1] Affirmed by Lord Cottenham, Jan. 22, 1840. 4 Myl. & Cr. 377, 407.

 1838.—Clark v. Jaques.

good discharges to his said trustees. And he declared it to be his will, that the said annuitant *should not* sell, or dispose of, or in any manner incur, or *anticipate* her said annuity, or any part thereof, or the future or growing payments of the same in anywise howsoever. That the testator died without having altered his will, which was proved on the 20th of February, 1823.

The petition then stated that the petitioner, Sarah Grace Hitchcock, was born on the 17th day of August, 1804, and was a spinster at the time of the death of the said testator; and on or about the 14th day of May, 1823, she intermarried with Thomas Jaques, who afterwards departed this life; and in January, 1836, she intermarried with Richard Hitchcock, who was born on the 8th day of May, 1792; that during the time the petitioner, Sarah Grace Hitchcock, was so a spinster, and during her marriage with the said Thomas Jaques, also during her widowhood, and since her marriage with the petitioner Richard Hitchcock, down to the 30th day of July then last past, she had been in the receipt and enjoyment of the said annuity.

The petition then stated certain orders of the court, dated the 10th of February, 1827, the 10th of August, 1831, and the 20th of February, 1836, by which, the "annuity had been directed to be paid to the se- [*38]parate use of Mrs. Hitchcock.

The petition then stated, that the petitioners, by certain articles of agreement, made and entered into on the 2d day of August instant, had contracted and agreed to sell unto Ireneus Mayhew, and the said Ireneus Mayhew had agreed to purchase, at or for the sum of 440*l.* (subject as in the said contract or agreement was mentioned,) all that the said annuity or yearly sum of 50*l.* so given and bequeathed to the petitioner, Sarah Grace Hitchcock, by the will of William Clark deceased, for and during the joint lives of the petitioners, Richard Hitchcock and Sarah Grace, his wife, on a good title being shown to the said annuity, and on Ireneus Mayhew, the purchaser, being put in the receipt of the same annuity, under the order of this honorable court, and it prayed that the agreement or contract of August, 1838, might be confirmed, and the sale thereby intended to be made; that the said Ireneus Mayhew might be entitled, and directed to receive, all future payments of the said annuity of 50*l.* thereafter to accrue due during the joint lives of the petitioners, Richard Hitchcock and Sarah Grace Hitchcock, and for a certain consequential directions.

Mr. *Bilton*, in support of the petition.

Mr. *Wilcox*, for the trustees.

November 5.—THE MASTER OF THE ROLLS:—The testator, by his will, dated the 25th of October, 1822, bequeathed, out of the interest of the residue of his estate, an annuity of 50*l.* to Sarah Grace Brown, spinster, for "her separate use, not subject to the debts or control of any husband, [*39]

 1838.—*Dixon v. Dixon*.

at the time of the testator's death, or afterwards, and she was not to have power to alienate.

The testator died leaving the annuitant a spinster.

On the 14th of May, 1823, the annuitant married Thomas Jaques, who some time afterwards died.

And on the 22d of January, 1836, the annuitant, then the widow of Jaques, married Richard Hitchcock.

In August, 1838, Hitchcock and wife agreed to sell the annuity to Ireneus Mayhew, and the fund out of which the annuity is payable, being in court, this petition prays that the annuity may be paid to the purchaser.

I do not think fit to grant the prayer of this petition, because I think, that the interest was effectually given to the woman for her separate use, and with restraint upon alienation during her life ;[1] and that the fact of her having been single at the testator's death, and a widow during the period which elapsed from her first husband's death till her second marriage, do not vary the nature of her estate and interest.

No order made upon the petition.

 [*40]

**DIXON v. DIXON*.

1838 ; November 7.

A lady being entitled, subject to a prior life estate, to certain freehold and funded property, she settled the same, on her first marriage, for her separate use, independent of her intended or any other husband. Her first husband died, and she married a second time : Held, that the property still belonged to her as her separate estate.

THIS bill was filed by Ann Maria Dixon, the wife of the defendant, John Dixon, by her next friend, against her husband and a trustee, claiming to be entitled to certain property, as being her separate estate, under the following circumstances :—

At the time of the marriage of the plaintiff, Ann Maria Dixon, then Ann Maria Shields, with her first husband, Samuel Simpson, she was entitled, in remainder, to a certain portion of two freehold houses, her mother having a previous life estate therein : she was also entitled, in remainder, to a share in two sums of money invested in the funds, in which also her mother had a previous life estate. In August, 1821, the plaintiff (her mother being then living) married Samuel Simpson, on which occasion a settlement was executed, whereby her interest in these freeholds was conveyed to trustees, in trust, for sale, and she assigned to trustees all her interest in the stocks and

[1] While covert, the restraint upon alienation is void, as inconsistent with the nature of the gift but when the donee becomes covert, then the restraint upon alienation applies. *Tullett v. Armstrong*, ante, 22. Lord Cottenham, S. C. 4 Myl. & Cr. 394, 406.

1838.—Dixon v. Dixon.

funds; and it was declared, that the trustees should stand possessed of the produce of the real estate and of the funds, upon the trusts following:—

Upon trust and to the intent that, during the natural life of the plaintiff, the interest, dividends, or annual proceeds of the said trust moneys, stocks, funds, and securities, might be for the sole and *separate use* and disposal of the plaintiff, *exclusive of the said Samuel Simpson, or any other husband* with whom she might intermarry, and free from his debts, engagements, dominion and control; and to that end, upon trust, to pay such interests, dividends, or annual proceeds from time *to time as the same [*41] should be due, and be received either into the proper hands of the plaintiff, and for which her receipt, notwithstanding her coverture, should be a good discharge, or to such person or persons, and for such use and purpose as she, by writing under her hand, should, notwithstanding her coverture, from time to time, as the interest, dividends, or annual proceeds should arise, but not in any way by anticipation, direct. And it was by the said indenture further declared and agreed by and between the parties thereto subject, and without prejudice, to such powers of appointment and provision, for advancement for the children of the marriage, as were therein mentioned; that in case there should not be any child or children of the intended marriage, or if there should not be any child who should become entitled to a vested interest in the trust moneys, stocks, funds, or securities, the trustees and the survivor of them, and the executors or administrators of such survivor, should stand possessed and interested of and in the same, in trust, for the plaintiff, her executors, administrators and assigns, in case she should happen to survive the said S. Simpson.

Samuel Simpson died in October, 1827, without having had any children by the plaintiff. The plaintiff afterwards married the defendant, John Dixon, on which occasion no settlement was executed; and, in February, 1838, the plaintiff's mother died, whereby the plaintiff became entitled, in possession, to her proportion of the freeholds and of the funds in question: she filed this bill in February, 1838, stating these circumstances, and that she had not, for some time past, been supported by John Dixon, and that she was therefore wholly without the means of subsistence: the bill also stated that, on the second marriage, her husband had notice of the settlement.

The defendant, the husband, by his *answer, admitted that, prior to [*42] his marriage with the plaintiff, he had heard that a settlement had been executed on the occasion of the plaintiff's previous marriage with Samuel Simpson; but the defendant said he was never made acquainted with, or informed of the contents of that settlement, and that he never saw the same;[1] he submitted, whether the settlement made on the first marriage of the plaintiff was binding on him, and he claimed to be absolutely entitled,

[1] As to the equity of the husband to set aside a settlement of the property of his wife executed by her during the treaty of marriage, see *Taylor v. Pugh*, 1 Hare, 608.

 1838.—*Feary v. Stephenson.*

for his own use, to the whole of the property : he also stated that he had separated from his wife in consequence of her misconduct.

Mr. *Pemberton* and Mr. *Thompson*, for the plaintiff.

Mr. *Kindersley* and Mr. *Stuart*, contra, for John Dixon.

Mr. *Perry*, for the trustees.

THE MASTER OF THE ROLLS held that the plaintiff was entitled, for her separate use, to the income of the trust funds.[1]

FEARY v. STEPHENSON.

1838 : November 16 ; December 7, 8.

One of several co-plaintiffs mortgaged his interest and became insolvent pending the suit. A supplemental bill was filed by the other co-plaintiffs against the mortgagee and the provisional assignees alone : Held, that the defendants in the original suit, who were accounting parties, ought also to have been made parties to the supplemental suit.

THE original bill in this case was filed by Samuel Feary, A. Manning, and W. C. Bromley, and Elizabeth his wife, against Joseph Stephenson, and William Read, (trustees under the will of John Stephenson,) Elizabeth Stephenson the executrix, and other parties interested in the residue of [*43] the testator's estate, for an 'account of the real and personal estate of the testator, and for payment of one-eighth part thereof, to which Elizabeth Bromley, as one of the children of the testator, was entitled.

W. C. Bromley and Elizabeth Bromley, it appeared, had assigned their share to Feary, in consideration of a sum of 600*l.*; but Feary, by a memorandum endorsed on the assignment, admitted this sum to be the money of Manning, and that he was a mere trustee for him. Feary afterwards purchased of Manning, and became entitled to one-half of the said share. These facts appeared on the original bill.

Feary subsequently assigned his interest to Reeves, by way of mortgage, and afterwards took the benefit of the insolvent debtors' act.

A supplemental bill stating these circumstances, was then filed by Manning and Bromley and his wife, against Reeves and the provisional assignee alone.

The original and supplemental suits now came on for hearing.

Mr. *Kindersley* and Mr. *O. Anderdon*, for the plaintiffs.

Mr. *Pemberton* and Mr. *Jeremy*, for the defendants, the trustees, objected to the case proceeding, on the ground, that Stephenson and Read had not been made parties to the supplemental bill.

Mr. *Cooper*, for one of the defendants, referred to a case of *Lloyd v. Meredith*.(a)

(a) At the rolls, 15th March, 1838, unreported.

[1] The decisions in this and the preceding case are, evidently, merely corollaries from the decision in *Tullett v. Armstrong*.

1838.—Feary v. Stephenson.

*THE MASTER OF THE ROLLS :—The original bill was filed by [*44] three persons, alleged to have an interest in the testator's estate, and it was answered by the accounting party; Feary and Manning and Bromley and wife were the parties to whom the defendants were called on to account. The bill is brought to a hearing, and then it is admitted that Feary has no interest; therefore, as it now stands, the suit is prosecuted by a party who has no interest; and it is then alleged, that there is another suit to which the assignees of Feary are made parties. I must have some authority produced before I can allow this case to go on. The cases in which the interest of a defendant has devolved upon another person, raised a very different question.[1]

The case stood over to produce authorities.

November 7.—Mr. Kindersley and Mr. O. Anderdon. It is not necessary to make the original defendants parties to a supplemental bill, unless they have an interest in the supplemental matter. This was decided by Sir John Leach in *Bignall v. Atkins*.(a) The same objection, as in the present case, was raised in *Greenwood v. Atkinson*,(b) but it was overruled by the Vice-Chancellor. What possible interest can the trustees have in the matters stated in this supplemental bill? their liability is neither increased nor diminished. Where, in the progress of a suit, a child comes into *esse*, and who, being one of a class, becomes interested in the subject matter of the suit, it is the practice to file a supplemental bill against that child alone, and not to make all the other original defendants parties thereto. Again, where in the progress of a suit it becomes necessary to revive, the bill *of re- [*45] vivor is not filed against all the original defendants, but only against the party in respect of whose interest the revivor becomes necessary. No advantage can result from allowing this objection, but the expense of the suit will in this, and all other similar cases, be uselessly increased by making all the original defendants parties to a new bill. They also cited Redesdale, p. 62.

Mr. Cooper, for another defendant.

Mr. Reynolds, for the provisional assignee.

THE MASTER OF THE ROLLS, without calling for a reply. There being no authority produced, I am bound to allow the objection. An accounting party ought to know, who it is, that calls upon him for an account. The case is just as simple as this, a party calls for an account, and the defendant, at the hearing, is ready to account, and he is then for the first time informed,

(a) *Mad.* 369.

(b) 5 *Sim.* 419.

[1] As to the necessity of a plaintiff's having an interest in the subject in controversy, see *The King of Spain v. Machado*, 4 *Russ.* 225. *Cuff v. Platell*, id. 242. *Makepeace v. Haythorne*, id. 214. *Tallmadge v. Pell*, 9 *Paige*, 412. *Egan v. Heenan*, 1 *Flan. & Kel.* 39. *Page v. Townsend*, 5 *Sim.* 395. *Clason v. Lawrence*, 3 *Edw. Ch. Rep.* 53. *Oakey v. Bend*, id. 482.

 1838.—Feary v. Stephenson.

that some of the plaintiffs have no right to call for such account, or that one of them has transferred his right to some one else of whom the accounting party never heard before. Is it possible to support a record in such a state?

I regret the extra expense to which the parties will be put by allowing the objection, but it would be much more to be regretted, if an accounting party were to be ignorant to whom he is to account, up to the very time of the hearing.

The cases cited have nothing to do with the present; the case of a defendant's interest being transferred is very different, for the plaintiffs remain the same to the end.[1] In the cases referred to, where the interest of one [*46] of the defendants was transferred, the only thing "necessary was, that the plaintiff should bring before the court a proper substitute for such parties.[2]

[1] Where trustees, defendants, are changed pending a suit against the trust fund, it is not absolutely necessary to bring them before the court although the plaintiff has a right to do so, before a decree; and in that case, supposing the cause to be at issue, it should be done by a supplemental bill. *The North American Coal Co. v. Dyett*, 2 Edw. Ch. Rep. 115. And see 10 Sim. 239, n. 1.

[2] In *Dyson v. Morris*, 1 Hare, 420, Wigram, V. C., said; "The question then is, whether the mortgagor ought to have been made a party to the supplemental bill. I do not mean to decide any general proposition with respect to the cases which require that the defendants to an original bill should be parties to a supplemental bill. If compelled, which I am not, to express an opinion upon that point, I should rather incline to say, that the cases in which the parties to the original bill were necessary parties to a supplemental bill, were those, in which the interests of the original defendants required that such new parties should be before the court, and that the cases in which the parties to the original bill were not necessary parties to the supplemental bill were those in which the new parties are brought before the court in respect of the interest of the plaintiff, or of the new defendants. It is sufficient, however, in this case to say, that the decision in *Greenwood v. Atkinson*, (5 Sim. 519,) which was come to after argument, was followed in the *Attorney General v. Pearson*, (7 Sim. 302,) in *Semple v. Price*, (10 Sim. 238,) and was not disapproved of by Lord Langdale in *Feary v. Stephenson*. Upon these cases, I observe only that the practice which they establish cannot possibly work injustice in this case. The original and supplemental causes are heard together. The mortgagor has a right to insist that the decree shall provide for the reconveyance of the estate upon payment of the mortgage money, and it is only for the purpose of such reconveyance, that the executors of E. T. are necessary parties to the cause. If the court cannot by means of the original or supplemental bill make such a decree as the mortgagor is entitled to, the suit must fail; but if the original and supplemental bill do enable the court to make the decree to which the mortgagor has a right, it is obvious that he has no reason to complain of the form of the record." In a subsequent case, *Jones v. Howell*, 2 Hare, 342, 350, the Vice-Chancellor speaking of his previous decision, says. "In *Dyson v. Morris*, I stated my impression of the general rule on the subject of making parties to the original bill, parties to a supplemental bill to be, that the original defendants were necessary parties where their interests required that the new defendants should be brought before the court for the purpose of deciding questions between the original and new defendants: and that the original defendants were not necessary parties to the supplemental bill, when the new defendants were brought before the court to contest some question with the plaintiff, in which the original defendants had no interest. To this rule there may be exceptions and cases not calling for its application. In *Dyson v. Morris*, I availed myself of the direct authority of *Greenwood v. Atkinson*, and the tacit authority of the other cases, to make that decree which appeared substantially just, and by which expense would be saved. The executors of E. T. in that case, enabled me by decree, and at once, and without further litigation or inquiry, to give the mortgagor, (the objecting party,) all he asked against those executors,

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The cause was allowed to stand over, with liberty to add parties by amendment, or otherwise.

Mr. *Pemberton* asked for the costs of the day, on the ground, that his clients not having been made parties to the supplemental bill, they had no opportunity of raising the objection by their answer, and

His Lordship, on that ground, ordered the plaintiffs to pay such costs.

GRAFFLEY v. HUMPAGE.

1838: July 13, 14; November 8.

By a marriage settlement certain specified property of the wife was settled, with an ultimate limitation, in default of children, to her next of kin, and the husband covenanted to settle any property which his wife, or he in her right, should thereafter, during the coverture, succeed to the possession of, or acquire on like trusts. At the time of the marriage, a sum of money, which was not mentioned in the settlement, stood settled, in trust, for the wife for life, with remainder to her children, with remainder as she should appoint, and in default thereof, "to her executors, administrators and assigns." The husband survived the wife, there were no children, and the wife made no appointment: Held that, after the death of the husband and wife, the next of kin of the wife, and not the representatives of the husband, were entitled to the fund.

The words "executors and administrators" have in some cases been construed to mean next of kin, but the words "executors, administrators and assigns" do not admit of that interpretation.

ABRAHAM HALL, by his will, dated the 3d October, 1793, gave 4000*l.* to trustees, on trust, to pay the interest thereof to his wife and daughter equally, share and share alike, for their sole and separate uses, independent of any husband; and after the decease of either of them, the whole interest was to be paid to the survivor of his wife and daughter, for her separate use for life; and after the decease of the survivor, the interest was to be applied to the maintenance of the children of the daughter, who should be living at the death of the survivor of the wife and daughter, till *they attained [*47] the age of twenty-one years, and the capital was to be transferred to such children, when they attained twenty-one, equally. And in case the daughter should die without leaving any such children, (which event happened,) the testator gave one moiety of the sum of 4000*l.* to his brother John

namely a conveyance. The mortgagor obtained by the decree in *Dyson v. Morris*, at once, and without litigation, all he asked: there was nothing more to try; and I availed myself of the authority of the cases referred to for the purpose of saving expense, when I could at once give the objecting party all he could claim as the ground of his objection. The case may be very different where I cannot at once give the objecting party all he asks: where the rights of the co-defendants are to be litigated *inter se*, and I cannot immediately decide and secure those rights. Where there is or may be—a case between co-defendants, which each as against the other, claims the right to litigate—the rule of the court, as I understand it, is, that every defendant shall have an opportunity of stating upon the record the case he relies upon against every party to the cause with whom he may have rights to litigate. I think *Greenwood v. Atkinson* was not meant to decide anything opposed to this principle, &c. &c. *Feary v. Stephenson* supports the same proposition. In the application of undisputed principles to individual cases, differences of opinion must inevitably occur," &c. And see 10 Sim. 239, n. 1.

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Hall, and the other moiety (which was the sum in question in the cause) to such persons as the daughter, whether covert or sole, should by deed or will appoint, and in default of appointment, *to the executors, administrators, or assigns of the daughter.*

After the date of the will, and in 1794, the testator's daughter married the Rev. George Vowell, by whom she had no issue, and he died soon after the marriage, in the testator's lifetime.

The testator died in December, 1800, and in the beginning of 1807, Mrs. Vowell, the testator's daughter, then a widow, was, under his will, entitled to the interest of the 4000*l.* as to one moiety in possession, and as to the other moiety in remainder, after the death of her mother Anna Hall, for her life, to her separate use; and a moiety of the capital was limited to her executors, administrators, or assigns, subject to the contingent interest of children, and to an absolute power of appointment in herself. She was at the same time entitled absolutely to the sum of 5066*l.* 13*s.* 4*d.* 3 per cent. consolidated bank annuities, standing in her own name, and to the sum of 4500*l.* sterling, which was vested on securities in her own name.

In that state of things, and previously to the marriage which afterwards took place between Mrs. Vowell and Thomas Humpage, a settlement, dated the 25th day of March, 1807, was executed by and between Mrs. Vowell of the first part, Thomas Humpage of the second part, and Joseph Wilson, [*48] John Clayton, and Samuel Mills, *who were trustees, of the third part; and thereby, after reciting that Mrs. Vowell was possessed of, or entitled to the 5066*l.* 13*s.* 4*d.* 3 per cent. consolidated Bank annuities, and the 4500*l.* sterling, and that it was agreed that those sums should be settled as therein-after mentioned; *and that all such future fortune which Mrs. Vowell should acquire or succeed to, should, when the same should accrue to and vest in her, be also settled as thereafter mentioned:* and further reciting, that, in order to such settlement of her present fortune, she had transferred the 5066*l.* 13*s.* 4*d.* 3 per cent. annuities, and the securities for the payment of the 4500*l.* had been assigned to the trustees; it was witnessed, that, in consideration of the intended marriage, and *for making some provision for Mrs. Vowell and Thomas Humpage, and the issue between them* to be begotten, it was declared and agreed, that the trustees should stand possessed of the 5066*l.* 13*s.* 4*d.* 3 per cent. consols, and the 4500*l.*, after the marriage, on trust, to pay the interest and dividends to Mrs. Vowell, and her assigns, during the joint lives of herself and her husband, for her separate use; and after the decease of either, to the survivor for life; and after the decease of the survivor of them in trust, for all the children of the marriage, as thereafter mentioned; but in case there should be no child of the marriage, and Mrs. Vowell should survive Thomas Humpage, upon trust, for her absolutely; but in case she should die in the lifetime of her intended husband, then, after his death, on trust, to assign and transfer the trust funds, to such persons as Mrs. Vowell should appoint; and in default of appointment, upon trust, to pay, assign and

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transfer the same, unto, between and amongst the next of kin of Mrs. Vowell, according to the statute enacted for the distribution of intestate estates, in case she had died a *feme sole*, unmarried. And the settlement contained a covenant by *Mr. Humpage, "*That in case the said Eliza- [49] beth Vowell, his intended wife, or he the said Thomas Humpage, in her right, should at any time or times thereafter during the said coverture, succeed to the possession of, or acquire any property, estate, or effects, whether real or personal, and whether by devise, bequest, descent, or otherwise howsoever, then, that he the said Thomas Humpage, his heirs, executors, administrators, or assigns, would at his, their, or some or one of their own proper costs and charges, and when thereunto required by the said Joseph Meson, John Clayton and Samuel Mills, their heirs, executors, administrators, or assigns, or any or either of them, make, do and execute, or join and concur with the said Elizabeth Vowell, his intended wife, and all other necessary parties, in making, doing and executing all such acts, deeds and things, devices, conveyances, assignments and assurances in the law as should be necessary, and as counsel should advise and require, for the conveying, settling and assuring all such estate, property and effects, as the said Elizabeth Vowell, or the said Thomas Humpage in her right, should or might so succeed to, or acquire as aforesaid, to the uses and upon the trusts following, that is to say, to the use, intent and purpose, that the rents and profits, interest, dividends and annual produce thereof respectively, might be secured to be paid to the said Elizabeth Vowell, for and during the joint lives of her and the said Thomas Humpage, her intended husband, upon her own separate receipt, to and for her sole and separate use, exclusive and independent of him, and without being subject to his debts, control, or engagements; and from and after the decease of the said Elizabeth Vowell, then upon such and the like trusts for the benefit of the children of them the said Thomas Humpage and Elizabeth Vowell, his intended wife, as were thereinbefore declared of and concerning the said trust moneys and *the securities [50] for the same, or as near thereto as the nature of the respective properties, the death of parties, and other circumstances, and the rules of law and equity would admit; and failing such issue, then in trust, for such person or persons and for such intents and purposes as the said Elizabeth Vowell should at any time thereafter, whether covert or sole, and notwithstanding her said intended coverture, by her last will and testament in writing, or any writing in the nature of, or purporting to be her last will and testament, or any codicil or codicils thereto, to be by her duly signed and published, direct or appoint; and in default of such direction or appointment, then as to real property, in trust, for the heir at law of the said Elizabeth Vowell, and as to personal property, in trust, for her next of kin, by force of the statute for distribution of intestates' estates, in case she had died a *feme sole*, and unmarried."*

Anna Hall, the mother of Mrs. Humpage, having died in the year 1817,

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Mrs. Humpage thereupon became entitled, in possession, to the other moiety of the interest of the 4000*l.* bequeathed by her father's will to her for her life, to her separate use.

In September, 1832, Mrs. Humpage died, leaving her husband surviving her, without having had any issue, and without having made any appointment, either of the stock and money specifically comprised in the settlement, or of the moiety of 4000*l.*, which she had power to appoint under her father's will. Thomas Humpage died in 1834, without having taken out letters of administration to the personal estate of his wife, Elizabeth Humpage, or doing any act to possess himself of her moiety of the 5797*l.* consols, on which the 4000*l.* had been invested. Letters of administration of the goods of Mrs. Humpage, limited to the purposes of this suit, were, after her husband's death, granted to one of the plaintiffs.

[*51] *This bill was filed by the next of kin of Mrs. Humpage, against the trustees of the fund and the personal representatives of Mr. Humpage, claiming the moiety of the fund.

Mr. *Pemberton* and Mr. *Collins*, for the plaintiffs.

Mr. *Tinney*, and Mr. *George Turner*, for the personal representatives of Mr. Humpage.

Mr. *Kindersley* and Mr. *Bailey*, for the trustees.

The following authorities were cited and relied on :—*Richards v. Chambers*, (a) *Lee v. Muggeridge*, (b) *Stiffe v. Everett*, (c) *Woodcock v. The Duke of Dorset*, (d) *Gage v. Acton*, (e) *Douglas v. Congreve*, (g) *Tayleur v. Dickenson*, (h) *Prebble v. Boghurst*, (i) *Bulmer v. Jay*, (k) *Palin v. Hills*, (l) *Sabberton v. Skeeles*, (m) *Collier v. Squire*, (n) *Anderson v. Dawson*, (o) *Purdew v. Jackson*, (p) *Massey v. Parker*. (q)

November 8.—THE MASTER OF THE ROLLS.—The question in this case is, whether the sum of 2000*l.*, being one moiety of a sum of 4000*l.* bequeathed by the will of Abraham Hall, belongs to the next of kin of Elizabeth Humpage, deceased, or to the legal personal representatives of her husband, Thomas Humpage, deceased, who survived her.

[His Lordship stated the circumstances of the case, and proceeded]—

[*52] *The question is, whether, in the events which happened, this moiety of the 4000*l.* either according to the true intent of the will, or by the operation and effect of the settlement, belonged to the next of kin of Mrs. Humpage.

From the care which the testator took to limit the 4000*l.*, to the separate use of his daughter, independent of any husband, it is probable that his principal intent was to exclude the husband; and cases have occurred, in which,

(a) 10 Ves. 580.

(b) 1 V. & B 118.

(c) 1 My. & C. 37.

(d) 3 Bro. C. C. 568.

(e) 1 Salk. 327.

(g) 1 Keen, 410.

(h) 1 Russ. 521.

(i) 1 Swans. 309.

(k) 4 Simons, 49.

(l) 1 My. & K. 470.

(m) 1 Russ. & M. 587.

(n) 3 Russ. 467.

(o) 15 Ves. 532.

(p) 1 Russ. 1.

(q) 2 Myl. & K. 174.

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to support the plain intent, the words "personal representatives," or "executors and administrators," have been construed to mean next of kin; but the words "executors, administrators and assigns" do not appear to me to admit of this interpretation; and I think that, subject to the prior limitations and the power of disposition, the words of this will gave an absolute interest to Mrs. Humpage; and if there had been no settlement, would, in the events which have happened, have enabled her husband, as her administrator, to take the fund.[1]

Upon the settlement, I think that there is considerable difficulty in any view of the case.

The 4000*l.* given by the father's will, is not mentioned in the settlement at all. It was already vested in the trustees of the father's will, and limited for the benefit of children, though not in the same way as was contemplated in respect of the property specifically comprised in the settlement; and Mrs. Humpage, in default of children, had an absolute power of appointing a moiety, the other moiety being given over. These circumstances may, perhaps, account for the omission from the settlement, and the parties may have regarded the power of disposition, which was only to have place in default of children, and the ultimate limitation, which ^{was} only to [*83] take effect in default of children and of appointment, as something which was to arise, or be acquired in future, and as such, to be subject to the husband's covenant. But, however this may be, the settlement is silent as to the 4000*l.*, and although the settlement, in words, refers to the present, and also to the future fortune of Mrs. Humpage, it is argued for the defendants, that by the present fortune of Mrs. Humpage, the parties only meant the 5066*l.* 13*s.* 4*d.* 3 per cent. annuities and the 4500*l.* sterling, specifically comprised in the settlement; and that by the future fortune, was meant only, such new acquisitions as might be made during the coverture, without reference to and not comprising any property, other than that specifically comprised in the settlement, to which Mrs. Humpage might then be entitled. It is further argued, that although the right, which ultimately became available to the husband, was acquired by the coverture, yet, that nothing succeeded to the wife, or to the husband in her right, during the coverture; and that nothing was acquired by the husband, till, by the death of the wife, the coverture was determined; and then it is insisted that, the recital having reference only to such future fortune as Mrs. Humpage should acquire or succeed to, and the covenant fixing the period of coverture, as the time during which the wife, or the husband in her right, should succeed to the possession of, or acquire any property, estate, or effects, this particular property is effectually excluded.

I cannot, however, acquiesce in this argument; there are, indeed, difficul-

[1] "*Legal or personal representatives may mean next of kin, but executors or administrators cannot.*" Lord Lyndhurst, *Daniel v. Dudley*, 1 Phillips 6.

 1838.—Gouthwaite v. Rippon.

ties in any construction of the settlement,[1] but having regard to the terms in which the settlement is expressed, I think that the intention was, to settle all the property on Mrs. Humpage, which was considered to be disposable; that Mr. Humpage was intended to have no beneficial interest in any [*54] part of her property during her life, and that after her death, *he should not have more than a life interest in the 5066*l.* 13*s.* 4*d.* 3 per cent. annuities and 4500*l.* sterling.

It is admitted, that any thing which he acquired in her right, during the coverture, was bound by the covenant; now it was by the coverture only, that he acquired the marital character, which afterwards entitled him to administer and possess the estate of his deceased wife: the right, which upon the death of the wife became complete, had its inception by the marriage, and •existed during the coverture, and, it appears to me that, upon the true meaning and intention of the parties, and the equity of the settlement, Mr. Humpage might have been compelled, to subject the right so vested in him to the provisions of the settlement, though during the coverture, it was but inchoate, and might have been wholly defeated, by his death in the wife's lifetime: on the whole, therefore, it appears to me, that the 2000*l.* in question belongs to the next of kin of Mrs. Humpage.(a)

 GOUTHWAITE v. RIPPON.

1838: December 24

A motion for an injunction and receiver is irregular where the plaintiff amends his bill between the time of giving notice of moving and the time of bringing on the motion.

AN order to amend was obtained, but no amendment was made before the 13th December. On the 13th, a notice of motion was given for an injunction and receiver, for the 17th of December. The bill was amended on the same day, but after the notice of motion had been served.

On the 17th of December, a *subpœna* to answer the amended bill was served; and, in this state of things,

[*55] *Mr. *Pemberton* and Mr. *Hare* moved for an injunction and receiver.

Mr. *James Russell* objected, that the motion was irregular, the notice having been given on a record which no longer existed; and that, on the existing record, no notice of motion had been given.

THE MASTER OF THE ROLLS allowed the objection, and refused the motion.

(a) Affirmed, 31st May, 1839.

[1] Such difficulties are of constant occurrence. *James v. Durant*, 2 Beav. 179.

 1838.—*Evans v. Tweedy*.

EVANS v. TWEEDY.

1833: May 28, 29; November 6.

A trust for the payment of debts, in a will of personal estate, will not prevent the operation of the statute of limitations.

THOMAS HARTLEY, by his will, bearing date the 25th day of September, 1806, after giving to his wife, Jane Hartley, the sum of 200*l.*, and to Thomas Wilson and John Tweedy, the sum of 50*l.* a piece, gave and bequeathed all his money and securities for money, stock in the public funds and all the residue of his *personal estate* not therein before specifically disposed of, to the said Jane Hartley, Thomas Wilson and John Tweedy, and their executors, administrators and assigns, *upon trust*, to convert into money so much and such part thereof, as should be necessary for the purpose of that his will; and thereout, in the first place, *to pay* and discharge his, the said testator's funeral and testamentary expenses, *the debts which he should owe at his decease* and the pecuniary legacies thereinbefore bequeathed, or which he might bequeath by any codicil to his will.

Thomas Hartley died in the month of March, 1808, and this suit was instituted for the administration of the *estate. The decree was [*56] made on the 16th of May, 1836, and directed the Master to inquire whether any, and, if any, which, and to what amount, of the debts and legacies of the testator remained unpaid.

Under this decree, the petitioner, Mrs. Bowes, the widow and executrix of General Bowes, made her claim, and the Master, by his report in 1838, after setting forth several facts, which he considered to be established, found that a debt of 700*l.*, with interest, at 5 per cent., from the 3d day of April, 1803, remained unpaid, and was payable to the petitioner, Mrs. Bowes. To this report the plaintiffs excepted, and, by their exceptions, brought into question, not only the conclusion at which the Master had arrived, but also many of the facts which the Master had considered to be established.

The case now came on upon the plaintiff's exceptions, and upon a petition of Mrs. Bowes to confirm the report.

The case alleged by Mrs. Bowes was, that in the beginning of the year 1803, a certain estate, consisting partly of freehold and partly of copyhold land, and belonging to the late General Bowes, was vested in trustees, on trust, to sell the same for his benefit; that they agreed to sell it to the testator Thomas Hartley, for the sum of 700*l.*; that Hartley made the purchase, for the benefit of his son, Thomas Hartley the younger; and a conveyance to him, of the freehold, was prepared and signed by the trustees and by General Bowes; that possession of the land was given to Thomas Hartley himself, but that, in this state of things, the transaction, from some unexplained cause, was interrupted: the purchase money was never paid, and the deed of conveyance remained undelivered in the hands of the *vendors, [*57] or their solicitor. No claim was made till the year 1836, nearly thirty-

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three years after the date of the alleged transaction ; but it was insisted, that the claim, notwithstanding the lapse of time, was sustained ; first, because, by the will of Hartley, there was a trust for the payment of debts, which was not barred by the lapse of time ; secondly, because the parties interested in the personal estate of Hartley had from time to time admitted the debt to be due ; and thirdly, because the debt was clearly established, and, as it consisted of unpaid purchase money, it constituted a lien on the lands, and was a charge not barred by length of time.

The case of *Jones v. Scott*(a) was much commented on during the argument ; that case having, at the hearing of these exceptions, been argued on appeal, before the House of Lords, but no judgment had then been pronounced. In that case Lord Brougham, reversing the decision of Sir John Leach, held, that a trust for the payment of debts, in a will of personal estate, would prevent the operation of the statute of limitations.

Mr. *Pemberton*, Mr. *Spence* and Mr. *Purvis*, for the plaintiffs.

Mr. *Kindersley*, and Mr. *Bethell*, for Mrs. Bowes.

THE MASTER OF THE ROLLS said he would postpone deciding the point, as to the statute of limitations, until the result of the appeal in *Jones v. Scott* was known.

On the 16th of August, 1838, the House of Lords reversed the decision of Lord Brougham in *Jones v. Scott*. [1]

[*58] *November 6.*—THE MASTER OF THE ROLLS (after stating the case.)—As the trust, created by the will of Hartley, affected only his personal estate, and the case of *Jones v. Scott* has been reversed in the House of Lords, the argument, which is founded on the supposed trust, cannot prevail. And, upon the best consideration which I have been able to give to the evidence of Mr. Tweedy, it does not appear to me that an admission, or such an admission as can be binding upon him or his assignees, is made out against Hartley the son,

[After referring to the evidence on this point, his Lordship proceeded] —

I am therefore of opinion, that no admission or appropriation in favor of General Bowes, or his estate, is established.

With respect to the lien for unpaid purchase money, it has undoubtedly been considered as making a vendee or his heir a trustee for the vendor ; [2] but in this case, the suit is to administer the personal estate of Hartley, the father ; and on this occasion, Mrs. Bowes claims, as against the personal estate, a legal debt, or the benefit of a specific appropriation ; and if it were necessary to consider the question of lien on the real estate, I should be at a

(a) 1 Russ. & Myl. 255.

[1] Vide 4 Clarke & Fin. 382. 1 Myl. & Cr. 276, n. 1. *Freaker v. Cranefeldt*, 3 Myl. & Cr. 499.

[2] Vide *Winter v. Lord Anson*, 3 Russ. 488, 492, n. 1. S. C. 1 Sim. & Stu. 434, 445, n. 1. 2 Story's Eq. § 1217, 1218. *Selby v. Selby*, 4 Russ. 336, 341. n. 1.

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loss for grounds whereon to establish the lien, in a case where it is not known with sufficient certainty, what was the contract between the parties, what was the land, or the quantity of land agreed to be purchased, or what was the price.

His Lordship stated the evidence on this point, and concluded thus:—I am of opinion, that Mrs. Bowes had not made out her claim against the personal estate of Hartley, the *father; and, therefore, it appears to [*59] me, that the exceptions filed by the plaintiff must be allowed, and that the petition of Mrs. Bowes must be dismissed, without costs.

 DOUGLAS v. CONGREVE.

1838: November 12, December 19.

A devise of real and personal estate to a feme covert, for life, for her independent use and benefit, with remainder to her husband for life, "with remainder to the heirs of her body, in tail," with remainders over; accompanied with a declaration, "that all the aforesaid limitations were intended by the testator to be in strict settlement." Held, that, subject to the husband's life estate, the wife took an estate tail in the real estate, and an absolute interest in the personalty.

By the will of George Douglas, dated the 12th day of March, 1831, he expressed himself as follows:—"I give and bequeath unto Mrs. Margaret Stoddart, wife of James Douglas Stoddart, Esq., now residing with me, 50,000*l.* 3 per cent. consolidated annuities, to be transferred within six months after my decease to her, or as she shall direct, for her own sole and separate use, independent of her husband; and I give, devise and bequeath all my manors, messuages, farms, lands, tithes, tenements, and hereditaments at Chilston and elsewhere, in the county of Kent, with every of their rights, members and appurtenances, together with the use of all my household goods, plate, linen, horses and other cattle, and all my farming and gardening, live and dead stock, implements and utensils, used in and about my said estates, unto the said Margaret Stoddart, *for and during the term of her natural life, for her independent use* and benefit: and from and after her decease, I give, devise and bequeath all and every my said manors, messuages, farms, lands, tithes, tenements, hereditaments and premises with the goods and chattels therein and thereon as aforesaid, unto and to the use of the said James Douglas Stoddart, for his natural life, *with remainder to the use of the heirs of the body of the said Margaret Stoddart, in tail*; with remainder, to the use of my nephew, the Rev. Alexander Houstoun, for his natural life, with remainder to the use *of the heirs of his [*60] body, in tail, with remainder to the use of my niece Elizabeth Houstoun, for her natural life, with remainder to the use of the heirs of her body, in tail, with remainder to the use of my cousin Aretas Akers, son of the late Aretas Akers, Esq., for his natural life, with remainder to the use of the

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heirs of his body, in tail; and I do hereby declare, that all the aforesaid limitations of my estate are intended by me to be in *strict settlement*, with remainder to my own right heirs for ever." The testator nominated and appointed William Congreve, Ralph Dunn and John Morrison, executors of his said will.

At the original hearing, several points arising on this will were determined. (a)

The remaining question in this cause was, what interest the plaintiff took in a certain portion of the personal estate of the testator, George Douglas, namely, the household goods, &c. For the purpose of determining that question, it became necessary to ascertain what interest she took under the testator's will, in his real estates at Chilston and elsewhere, in the county of Kent; and that question was submitted to the Court of Common Pleas. The case was argued before that court in Trinity term, 1837, who certified that under the will, the plaintiff took an estate, in tail general, in the real estates. (b) The certificate having omitted to notice the estate given to the plaintiff's husband, it was afterwards amended, and the Judges of the Common Pleas thereby certified their opinion to be, "that the plaintiff took under the will of George Douglas, the testator, an immediate estate, for life, in the real estates of the said testator at Chilston and elsewhere, in the county of Kent; and an estate in remainder, in tail general, in the same lands, expectant on the determination of the estate for life, limited to James Douglas Stoddart."

The cause was now brought on, for further directions upon the Master's report, and upon the certificate of the Judges of the Court of Common Pleas, of their opinion, upon the case submitted to their consideration by this court; and the plaintiff now asked, that this certificate might be confirmed. It was contended for the defendants, who were devisees of interests in remainder, that the learned Judges had come to an erroneous conclusion, and they desired, that the case might be submitted to the consideration of another court of law.

Mr. *Pemberton* and Mr. *G. Richards*, for the plaintiff:—The testator has not, by his will, created an executory trust which the court, or the trustees are to carry into execution, by means of a conveyance or settlement, thereby moulding the limitations which the testator has expressed in untechnical language; but here is a strict legal devise, to the plaintiff, for life, "with remainder to the use of the heirs of her body in tail." It cannot now be argued, that this creates any thing but a legal estate tail in the plaintiff. The leading case on this point, and in which the law was restored after some infraction, was that of *Jesson v. Wright*, (c) in which the decision of the Court of King's Bench was reversed by the House of Lords. In that case, there was a devise to W., for life, with remainder unto the heirs of his body, as W. should appoint; and in default thereof, then to the

(a) See 1 Keen, 410.

(b) See 4 Bing. N. C. 1.

(c) 5 M. & S. 95. S. C. 2 Bligh, 1.

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heirs of W.'s body, share and share alike, *as tenants in common ; and [*62] if one child, the whole to such child. It was contended, that the testator did not intend the expression, "heirs of the body," in its strict sense. The House of Lords, however, held the contrary. Lord Redesdale said, "It cannot at this day be argued, that because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown."

Here, the devise is not to trustees, in trust to convey or settle, but a devise to the wife, for life ; with remainder to the husband, for life ; with remainder to the heirs of the body of the wife ; and in default, over ; with an ultimate remainder to the testator's right heirs. There is nothing to prevent this settlement from being a strict settlement, since, by a mere fiction of law, which gives an imaginary recompense to the issue, the courts sanction the issue in tail being barred. The difficulties which would arise from a construction different from that which has been arrived at by the Court of Common Pleas are insuperable. In what way can the court deal with this case ? Is the court to say, that, because the testator has expressed his intention, that the limitations should be in strict settlement, it will settle the estate in a mode different from that which the terms of the legal devise warrant ; and that too in a case where the testator has left nothing for the court to do—no discretion to exercise—but where, on the contrary, he has executed the intention himself ; will the court execute a legal devise, in the way in which it would an executory trust ?

The words give a clear estate tail, and this legal limitation is not to be altered by subsequent doubtful *expressions ; and where the court [*63] is not called on to make a settlement, but to declare what the expressions mean, it has no jurisdiction to alter the legal effect of the limitations.

Assuming, however, that the heirs take as purchasers, then they have a mere contingent remainder, which might be immediately defeated. The court would do nothing, therefore, by construing this a limitation to the heirs, as purchasers ; to render it effectual, an estate to trustees to preserve contingent remainders, must be introduced into the will ; for otherwise, the husband and wife might concur in destroying the contingent remainders ; but suppose an estate to trustees to be introduced into the will, how are the words "heirs of the body in tail" to be moulded ? If Mrs. Douglas had sons and daughters, are these words to be construed as first and other sons, in tail male, with remainder to the daughters *successive*, or as a class ; or is the limitation to sons to be in tail general ? How are the limitations to the sons of daughters, and to the daughters of sons to come ? Are the daughters of a son to take in priority to the sons of a daughter ? Are "heirs" to be read generally, and are sons and daughters to take equally ; or are sons to take as one class, and the daughters to take as another class ; are the sons to take *successive*, and the daughters in a class ? How can the court declare what

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the intention of the testator was? No two persons could agree as to what was meant by strict settlement, and the further the court proceeds, the more difficulties it encounters, and the more the court must become convinced, that the legal construction of this devise, which the Court of Common Pleas has arrived at, is the sound construction; and that there is nothing to enable the court to cut down the legal estate tail, and declare that the plaintiff takes a life estate only.

[*64] "It was suggested, when the case was before the court, that the limitation to the plaintiff, for life, was for her separate use, and was a trust estate; and that the limitation to the heirs of her body, in tail, was a legal remainder, and that, therefore, they could not coalesce; but the estate for life is not less a legal estate, because this court prevents the husband from interfering with it. The life estate is given to the wife, and not to a trustee, and a court of law would altogether disregard the direction, that she was to hold it for her separate use. The decision of the Common Pleas must be founded on this, that the two estates are legal and will coalesce; if this were not the case at law, the estates could not unite. The rules of the courts of law are equally applicable to this court, for no case exists where a devise, construed to be a legal estate in a court of law, has been construed differently, or as an equitable estate in equity. Subject to the life estate of her husband, the plaintiff is, therefore, tenant in tail of the real estates, and has an absolute interest in the personality.

Mr. *Kindersley* and Mr. *Thompson*, for *Houstoun Douglas* and *Elizabeth Douglas*; and Mr. *Glasse* for *Aretas Akers*.

It is impossible not to see, that the construction which the Court of Common Pleas has put on this will entirely defeats the intention of the testator, distinctly, satisfactorily and unambiguously expressed on the face of his will. We admit, that the rule in *Shelley's case* is fairly enunciated, as being universal and without exception; but it is a rule of tenure, and not of construction, and the court can never, by means of this rule, arrive at the intention of the testator: on the contrary, the rule is not to be regarded, until you [*65] have first ascertained, in what sense the testator has used the "expression "heirs," or "heirs of the body." Mr. *Fearne*, in his *Treatise*,^(a) says, "Nothing can be better founded than Mr. *Hargrave's* doctrine, that the rule in *Shelley's case* is no medium for finding out the intention of the testator; that, on the contrary, the rule supposes the intention already discovered;" and again, "when it is once settled, that the donor or testator has used words of inheritance according to their legal import, has applied them intentionally, to comprise the whole line of heirs to the tenant for life, and has really made him the terminus or ancestor, by reference to whom the successor is to be regulated, then comes the proper time to inspect the rule in *Shelley's case*." According to this, the court must first ascertain what the testator

(a) 8th edit. 187.

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meant by heirs of the body in tail, and when it has arrived at the intention, the application of the rule in *Shelley's case* is, we admit, universal.

Again, we admit, that if there be nothing to explain the words "heirs of the body," the testator must be taken to have used them in their ordinary sense; but the court must look at the whole will, and see if such was really the testator's intention. It has been laid down, "that there is no technical word in a will; if the testator's intent be plain, the court will modify and effectuate his expression," *King v. Burchell*; (a) and the same doctrine is laid down by Justice Buller in *Hodgson v. Ambrose*. (b) In many cases the court has put a construction on the words "heirs" and "heirs male," far different from their strict technical meaning, as in *Lisle v. Gray*, (c) *Low v. Davies*, (d) *Doe v. *Laming*, (e) *Goodtitle v. Herring*, (g) [*66] *Crump v. Norwood*, (h) *Goodtitle dem. Cross v. Woodhull*, (i) where the scope of the will showed such to be the testator's intention. In *Wright v. Jesson*, (k) it was not decided that the rule in *Shelley's case* was a rule of construction, but the court considered, that the testator had not used the words "heirs of his body" in any other than their technical sense; and, in order to give effect to the general intention, as in *Pierson v. Vickers*, (l) that all the issue should take, prior to the gift over, the expression was construed strictly; but, in *Wright v. Jesson*, it was throughout admitted, that the word heirs would yield to the intention of the testator: per Lord Eldon, p. 53, and per Lord Redesdale, p. 57.

Two cases have occurred since *Wright v. Jesson*, namely, *Right v. Creber*, (m) in which "heirs of the body" in a devise, were held to mean children; and *North v. Martin*, (n) where, in a limitation in a settlement to the wife and husband, for their lives, with remainder to the heirs of the body of the husband on the body of the wife, and their heirs, and if more children than one, equally to be divided amongst them, as tenants in common, it was held, that the husband took for life only, and that the children took by purchase.

The first thing to be done then, in the present case, is to ascertain, whether the testator intended to use these words in their technical sense; now, if this were a case of executory trust, it could not be argued, that the ancestor would take an estate tail; the meaning of the testator cannot then be different, when expressed in the same words, because, instead of [*67] creating a trust, he has devised a legal estate; he says, the limitation is to be in strict settlement, adopting the very words of Justice Blackstone, in *Perrin v. Blake*, (o) who, it is stated, "agreed with the majority of the Court of King's Bench, that if the intent of the testator manifestly and cer-

(a) 1 Eden, 431; and see *Austin v. Taylor*, 1 Eden, 365.

(c) 2 Levintz, 223; and see 1 P. Williams, 88.

(e) 2 Burr. 1100; and stated in *Hargrave's Law Tracts*, 506.

(h) 7 Taunt. 362.

(i) Willes, 593.

(k) 2 Bli. 1.

(m) 5 Barn. & C. 866.

(n) 6 Sim. 266.

(o) 4 Burrow, 2581.

(b) Doug. 327.

(d) 2 Lord Raymond, 1561.

(g) 1 East, 264.

(l) 5 East, 5-18.

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tainly appeared, by plain expression, or necessary implication, from other parts of the will, that the heirs of the body of A. should take by purchase, and not by descent, there a devise to A. for life, and, after his decease, to the heirs of his body, not only might, but must be construed an estate *in strict settlement*." Many difficulties may be imagined, but the only question now to be decided is, whether the plaintiff takes more than a life estate; the court must grapple with the other difficulties, suggested by the plaintiff, when they arise; but they exist in all cases of executory trusts; however the term, "strict settlement" is well understood, and frequently used by the court; as in *Perrin v. Blake*,^(a) by Lord Mansfield in *Doe dem. Duke of Devonshire v. Lord George Cavendish*,^(b) by Justice Buller in *Doe v. Mulgrave*,^(c) by Lord Eldon, in argument, in *Bastard v. Proby*,^(d) and explained by the Master of the Rolls in his judgment; by Lord Ellenborough in *Doe v. Wood*,^(e) and in *White v. Carter*,^(g) by Lord Hardwicke in *Allanson v. Clitherow*,^(h) and in his judgment in *Bagshaw v. Spencer*,⁽ⁱ⁾ and by Sir William Grant in *Blackburn v. Stables*,^(k) and in *Le Hunte v. Hobson*,^(l) and in *White v. Carter*,^(m) and also by conveyancers, as restricting [*68] the interest of the ancestor, to a life estate; *and it is enough, on the present occasion, to say, that a devise to one, for life, with remainder to the heirs of her body, in strict settlement, does not give more than an estate for life to the first taker. In this case the difficulty suggested, as to the subsequent limitations to the children, is removed by the circumstance, that it is stated expressly, that the issue are to take *in tail general*.

Again, the rule in *Shelley's case* will not apply, unless the two estates are of the same quality and character; the plaintiff's life estate is limited to her separate use, and the husband, is seised of the legal estate; upon his freehold there might be a remitter, Co. Litt. 251. He alone might have made a tenant to the *precipe*; and he alone could take a release, or confirmation to enlarge the estate. The husband is, therefore, a trustee for the wife, *Bennet v. Davis*,⁽ⁿ⁾ *Morgan v. Morgan*,^(o) even on a subsequent marriage, the life interest would retain its trust character, *Tullet v. Armstrong*,^(p) the estate to the plaintiff's heirs is a legal estate, and it cannot, therefore, unite with her trust estate for life, *Henry v. Purcell*.^(q)

It is evident, that the testator did not intend that Mrs. Douglas should take an estate tail, for if she had died in the lifetime of the testator, her children would have taken nothing, and the intention of the testator would have been defeated, unless they took as purchasers; they also cited *Gallini v. Gallini*,^(r) *Jack v. Featherstone*,^(s) *Poole v. Poole*,^(t) and *Jervoise v. The*

(a) 1 Coll. Jurid. 319. (b) 4 Term. R. 744, n. (c) 5 Term. R. 324. (d) 2 Cox, 7.
 (e) 1 B. & Ald. 518. (g) 2 Fden, 366; again in Ambler, 670. (h) 1 Ves. 24.
 (i) 1 Coll. Jurid. 384. (k) 2 Ves. & B. 371. (l) 5 Barn. & C. 903. (m) Ambler, 671.
 (n) 2 P. Williams, 316. (o) 5 Mad. 411. (p) Ante, page 1.
 (q) W. Black. 1002, and see the case and opinion in Fearn's Posthumous Works, 379.
 (r) 5 Barn. & Ad. 621. S. C. 3 Ad. & E. 340. (s) 9 Bligh, 237. (t) 3 Bos. & P. 627.

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Duke of Northumberland,^(a) and submitted that the certificate *of [*69] the Common Pleas was unsatisfactory, and that the plaintiff took a life interest only in the chattels.

Mr. *Tinney* and Mr. *C. H. Maclean*, for trustees.

Mr. *Pemberton*, in reply :—No declaration which this court can make can affect the legal limitations to the plaintiff and the heirs of her body. The court is not called on to direct a conveyance, or to make a settlement; the devise is a legal devise, over which the court has no control. The only ground for sending this case for the opinion of a court of law, was this; the chattels being limited in the same way as the real estate, the court took the opportunity of obtaining the opinion of a court of law, as to the construction of the limitations of the real estate, in order to guide its decision as to the chattels; the only question, therefore, is, whether the court considers the certificate so unsatisfactory, that it will not adopt it, in construing the gift of the chattels.

If the court were to attempt to model these legal limitations, then, instead of construing a will, it would be making one, without the slightest guide to enable it to effect it.

The estate to the plaintiff, for life, is a legal estate, and all the legal consequences must therefore follow. It is true that this court would restrain the interference of her husband, but a court of law would not regard that restraint; and it could hardly be contended that, because this court restricts the marital rights, it must therefore abridge the wife's estate from an estate tail to an estate for life. It is clear, at law, that the plaintiff takes an estate tail; then, on what principle can this *court interfere, and insist on [*70] her having a life estate only, when, even in this court, the rule in *Shelley's case* is followed in limitations in equitable estates, not in order to effectuate the intentions of the testator, which in ninety-nine cases out of a hundred it disappoints,—not because it approves of the rule, but from the necessity for the security of property, that the rules of construction should be the same in both courts?

December 19.—THE MASTER OF THE ROLLS, after stating the circumstances of the case, proceeded :—The gift amounts to a direct devise to the plaintiff, for her life, for her independent use and benefit, followed by a direct devise, after her death, to her husband, for his natural life, with remainder to the use of the heirs of her body, in tail, with remainders over, and a declaration, that all the aforesaid limitations were intended by the testator to be in strict settlement, with remainder to his own right heirs for ever.

That a devise to one for life, and, after an intermediate estate for life, a devise to the heirs of the body of the first devisee would of themselves vest an estate tail in the first devisee, is not denied; but it is argued, that upon

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this will, the testator expressly meant, that the words "heirs of the body," which he has used, should not be taken in their technical sense,—that the intention of the testator must govern the construction of the will,—and that, upon the intention, the case is not within the rule in *Shelley's case*. It is further argued, that the life estate of the plaintiff, is only an equitable estate; that the devise to her right heirs, is of a legal estate, and that on that ground, the estates could not incorporate into an estate of inheritance in the plaintiff.

[*71] "As to the intention, three indicia are relied on; first, the gift to the plaintiff, expressly for life; secondly, the limitation to the heirs of her body, "in tail;" thirdly, the declaration, that the limitations were intended to be in strict settlement.

A part of the argument in *Jones v. Morgan*,^(a) was founded on the words "for life;" and upon that, Lord Thurlow observed, (p. 220,) "I think the argument immaterial, that he meant the first estate to be an estate for life. I take it that in all cases, the testator does mean so; I rest it upon what he meant afterwards," and so I must consider it in the present case.

As to the words "in tail," added to the words limiting the estate to the heirs of [the plaintiff's body, they are certainly superfluous: a limitation to A. and the heirs of her body, in tail, is the same as a limitation to A. and the heirs of her body, without the words "in tail"—the words "in tail" make no difference in the estate given, and do not, as I conceive, show any intention to give an estate, different from that which is imported by the words used.

With respect to the words "in strict settlement," I apprehend it to be true, that in their ordinary sense, they import estates limited to persons who are living, for life, with remainder, in tail, to unborn issue;[1] and in the case of marriage articles, wherein it is agreed to limit an estate, for life, with remainder to the heirs of the body, this court, upon the presumed intention, will decree a strict settlement in the sense of the words; and also, that in the case of executory trusts with the like limitations and an expressed intention,

[*72] that the limitations shall be in strict settlement, this court will *execute that trust, in the same sense of the words, if it can be done consistently with the whole will; but that the words "in strict settlement" do not necessarily limit the first estate to a life interest, appears by the case of *Allanson v. Clitherow*,^(b) in which there was, as the words were construed, a direction, to limit an estate, for life, to the testator's son, and, subject to other provisions,

(a) 1 Bro. C. C. 206.

(b) 1 Ves. sen. 24.

[1] It is of the very essence of a strict settlement that the first taker or takers should have merely an estate for life; 2 Story's Equity, § 983; for, as Shadwell, V. C., after stating a clause of the will under discussion before him says, in somewhat quaint language; "Now if you hold that the true intent of this is, that J. G. shall take as tenant in tail, that clause becomes void; for J. G. has nothing to do, but to suffer a common recovery, and there is an end of it, whereas it is plain that the testator meant that that should be a part of the provision, and it cannot be made to take effect except by holding that J. G. takes an estate for life." *Graves v. Hicks*, 11 Sim. 549. See further *Bankes v. Le Despencer*, 10 Sim. 576, 594.

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a direction to settle the estate on the issue of the marriage, in strict settlement, as counsel should advise; and yet, upon the whole will, it was held, that the son took an estate tail. In the present case, there is no executory trust. It is a case of direct devise of the legal estate, and in terms which, according to the rules of law, give an estate tail to the plaintiff; and it does not appear to me, that the words "in strict settlement" can have the legal effect of altering that estate. An executory trust would have admitted greater latitude of interpretation, and the effect of the words might have been different.[1]

But it is further argued, that although the legal estate is given to the plaintiff, yet there is a direction, that she shall hold it for her independent use and benefit, which she cannot do without the intervention of this court, which converts her husband into a trustee for her, so that, in effect, she has only an equitable estate during her husband's life; and as that cannot coalesce with the legal estate, in remainder, the rule in *Sholley's case* does not apply.[2] It is, however, to be observed, that the legal estate is vested in the wife; that the power which the law gives to the husband, over the real estate of his wife, does not alter the nature or quality of that estate,[3] and that it is only with the marital power of the husband, that this court interferes, to secure to the wife the independent use of her property.

"In one sense, no doubt, the husband is, or may be made, a trustee [*73] for the wife, but not so as to alter the legal estate given to her by the testator; and, on the whole, I am of opinion, that subject to the prior estate for life, Mrs. Stoddart is entitled to an estate tail, in the lands in question, and, consequently, that the Judge's certificate must be confirmed. As the court is dealing with the personal estate only, it seems right, to make a declaration, in conformity with the certificate, as to the personal estate alone.

[1] "With respect to the construction of executory trusts, I think the rule of law is perfectly settled, that were there is a marriage settlement, not only on account of the consideration of marriage and the other considerations which are professed to be its objects, but also the nature of the instrument is a declaration of the intention of the parties that there should be what we call a strict settlement; for if a man agree before his marriage to provide for his wife and the general objects of the marriage, it would be manifestly absurd for him to limit to himself an estate which gives him the entire control over the property; that, would be a settlement in form, but not in effect. There is no difference in the nature of the thing between a voluntary settlement and a will. A settlement and a will stand on the same footing, save that the very act of making a settlement *inter vivos* more strongly enforces the probability of an intention that it should be strict, than in the case of a will." Sugden, Ld. Ch. *Rockford v. Fitzmaurice*, 1 Conn. & Law. 171, 172.

[2] Vide *McWhorter v. Agnew*, 6 Paige 111, 5.

[3] Vide *Brown v. Meredith*, 2 Keen, 532. *Tabb v. Archer*, 3 Hen. & Mun. 399.

1838.—*Hawkins v. Hall*.

HAWKINS v. HALL.

1838: December 20. 1839: February 11.

Though an outlaw cannot come into court to establish a demand, yet he may apply to the court to set aside an attachment which has been irregularly issued against him.

Service, out of the jurisdiction, of a *subpœna* for payment of costs, is irregular.

The same person who has caused another to be illegally arrested and detained, cannot serve him with a *subpœna* for costs whilst in custody.

THE case was, that the plaintiff's bill having been dismissed with costs, which were taxed at the sum of 161*l*. 18*s*. 0*d*., a *subpœna* for costs, to that amount, was issued against him, and he was served with the *subpœna* and demand for payment was made upon him at Boulogne, out of the jurisdiction of the court. The plaintiff afterwards came to England, and on the 17th of December last, he was arrested under the attachment, and being in custody, several detainers were lodged against him. On the 20th of December, a motion was made to set aside the attachment, and discharge the plaintiff out of custody for irregularity.

Mr. *Kindersley*, in support of the motion, contended, that the attachment was irregular, being founded on a service of the *subpœna* and a demand which had been made out of the jurisdiction; and secondly, that the writ of attachment, having issued previous to Michaelmas term, could not be executed after that term.

[*74] *Mr. *Pemberton*, contra, objected, that the plaintiff being an outlaw, and in contempt, could not be heard in a court of justice; but if the fact of his being in contempt was not sufficient to prevent the plaintiff making this application, (a) still that the outlawry of the plaintiff prevented his being heard in a court of justice. That outlawry was a more serious objection than a mere contempt; (b) the former might be objected by way of plea, whereas the latter could not. In *Davidson v. Marchioness of Hastings*, (c) it was held, that service out of the jurisdiction, namely, in Scotland, of an order *nisi* for an attachment, was good service; the object being notice only, the same reason applied here.

THE MASTER OF THE ROLLS (without hearing a reply):—I think that these proceedings must be discharged. The first question is, whether the plaintiff is entitled to make this application, he being under outlawry; I conceive that an outlaw is not entitled to come into a court of justice to establish a demand of his own: but this is not now the question, for the proceeding against the outlaw is in the nature of a penal proceeding for non-payment of costs; and the question is, whether, when a party has been improperly detained, he has not a right to come into court, to get rid of the irregular proceedings. He does not come to establish a demand, but to complain that in-

(a) *King v. Bryant*, 3 My. & C. 191. *Wilson v. Bates*, 3 My. & C. 197.

(b) *Loukes v. Holbeach*, 4 Bing. 419. *Aldridge v. Buller*, 2 Moo. & W. 412.

(c) 2 K. 509.

1838.—Hawkins v. Hall.

justice had been done by the party proceeding against him; or in other words, that the power of the court has been used improperly against him.[1]

Whatever was the case formerly, in the present day an outlaw is entitled to the benefit of the law, for his *personal protection, and he [*75] must, therefore, be entitled to apply to a court of justice, to remove an irregular order by which he is improperly detained. I think, therefore, he has a right to make this application. The next question is, if the proceedings are irregular. I shall say nothing as to the attachment being executed too late, as I think that the proceedings are irregular in form.

Except in particular cases, provided for by statute, or by special order of the court, the service of a writ ought to be made on the party within the jurisdiction.[2] I lately held,[3] that an order *nisi* for a sequestration, being a mere notice, was regularly served in Scotland, but that was a very different case. This is a *subpœna* in the name of the Queen, that is, a command in the Queen's name, which is to be obeyed, or, otherwise an attachment is to issue; this service is nugatory where the party is residing out of the jurisdiction, where the court cannot execute its process, and I think that a writ ought not, without order or authority, to be served on a party who is out of the jurisdiction, and not liable to the ulterior process of the court: I am of opinion that the service out of the jurisdiction, of the *subpœna* for costs, was irregular, and is no foundation for the attachment, which must, therefore, be set aside.

On the same 20th of December, after the order was pronounced, but before it could be, or at least before it was drawn up and served, another *subpœna*, for the same costs, was served, and another demand for the same was made on the plaintiff, whilst he remained in custody.

The plaintiff, being free from the attachment, applied to be discharged out of custody, in the several actions, *in which detainers had [*76] been lodged against him whilst in custody. The last rule for his discharge was made absolute on the 30th January, but, in consequence of some inaccuracy in drawing it up which required amendment, the rule, as amended, was not lodged with the Marshal of the Queen's Bench, till a little before two o'clock, on the 31st, at which time, Mr. Hawkins was informed, by the principal turnkey, that all was right and he might leave the prison as soon as he pleased; whereupon Mr. Hawkins stated his intention not to leave the prison till night; and he appeared to have paid his fees between four and five o'clock.

There was no evidence to show, that in the meantime, *i. e.* between two and four o'clock, Mr. Hawkins might not have gone freely wherever he

[1] So, a party who is in contempt, may at any time, come into court to clear his contempt. *Bickford v. Skewes*, 10 Sim. 193, 196.

[2] *Vide Dunn v. Dunn*, 4 Paige, 495. 1 Hoff. Ch. Pract. 111. 1 Barb. Ch. Pract. 51.

[3] In the case of *Davidson v. The Marchioness of Hastings*, 2 Keen, 509; which was cited at the bar.

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pleased ; but about four o'clock, a sheriff's officer, with the attachment obtained by Mr. Hall, and another officer, with a writ of *capias ad satisfaciendum* sued out by David Stockford, were on the watch to arrest him ; and Mr. Hawkins attempted to hide himself in the prison, and succeeded in concealing himself in the rooms of Mr. Montagu, (a prisoner,) till between nine and ten o'clock in the evening, when he was discovered and compelled to go into what is called the lobby of the prison, and, when there, he was immediately arrested. Being arrested under one of the processes, he was detained under the other. On the evidence, it did not appear whether the arrest was made under the attachment, or on the writ of *capias ad satisfaciendum*.

A motion was now made, to set aside the attachment, under which the plaintiff had been arrested for non-payment of the costs, and that, as to the attachment, the plaintiff might be discharged out of custody.

[*77] *Mr. Kindersley and Mr. Purvis, in support of the motion.

Mr. Pemberton and Mr. G. Richards, contra.

THE MASTER OF THE ROLLS (after stating the circumstances of the case.) It is clear, from the evidence, that Mr. Hawkins is endeavoring to avoid satisfying a just demand ; but, whatever his fraud or misconduct may be, he must be proceeded against in a legal method, and, if the process has issued against him irregularly, he is entitled to be discharged.

He moves that he may be discharged, on the grounds, first, that the *subpœna* for costs was irregularly served upon him : and secondly, that at the time of the arrest he was entitled to be privileged, and to leave the prison freely, for the purpose of returning home.

Whether a man, whose home is out of the jurisdiction, and who, being entitled to leave the prison in the middle of the day, and being then free to do so, does not think fit to avail himself of his liberty, but resolves to wait till night, plainly with the intent of then escaping, and who, being soon afterwards under apprehension of arrest, instead of appearing and claiming his privilege, secretes himself as long as he can, is, under such circumstances, entitled to privilege, is a question which it is not necessary for me to decide on this occasion,[1] as it appears to me that the service of the *subpœna* for costs, at the suit of Mr. Hall was, under the circumstances of this case, irregular. I do not concur in the argument, that a *subpœna* for costs may not

be regularly served on a party who is in prison, or even upon a party [*78] who is "irregularly and improperly in custody at the suit of persons not connected or colluding with those who effect the service ; but the question here is, whether the same man, who has caused another to be illegally arrested and detained, shall himself be at liberty so to avail himself of his own wrong, as to take advantage of that detention, for the purpose of

[1] A prisoner, who, having been placed in custody by a lawful attachment, has remained in prison voluntarily, without claiming his discharge after he was entitled to it, may be regularly detained under another attachment lawfully issuing against him. *Woodward v. Conebeer*, 1 Hare, 297

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serving a writ, which is issued at his own suit, and intended to be enforced by process of contempt.

I have not met with any authority distinctly applicable to the subject, but as it appears to me, that very serious mischief might be produced, if service of process out of this Court, under such circumstances as have occurred in this case, were allowed to be good, I have come to the conclusion, I own reluctantly, that the service of the *subpœna* for costs and the attachment for non-payment thereof, were irregular; and consequently, that Mr. Hawkins must be again discharged.

This decision was confirmed, on appeal, by the Lord Chancellor.(a)[1]

*DU HOURMELIN v. SHELDON.

[*79]

1838 : November 10. 1839 : January 28.

A devise of lands was made to English subjects, in trust to sell, and, after payment of mortgages, to invest the surplus moneys in the funds, in trust for persons, some of whom were aliens : He d, that the crown was not entitled to the share of the aliens either in the land or the produce.

THIS case came on, upon exceptions taken by a purchaser to the Master's report, that a good title was made to an estate sold under the decree in this cause.

(a) See *Webb v. Dorwell*, Barnes, 400 : (1756.) *Houson v. Walker*, 2 W. Blackst. 823 ; (1772.) *Loceridge v. Plaistow*, 2 H. Blackst. 29 ; (1792.) *Barlow v. Hall*, 2 Anstruther, 461 ; (1794.) *Sprnce v. Stuart*, 3 East, 89 ; (1802.) *Birch v. Prodger*, 1 New. Rep. 135 ; (1804.) *Barkley v. Faber*, 2 B. & Ald. 743 ; (1819.) *Same Case*, 1 Chitty, 579 ; (1819.) *Mackie v. Warren*, 5 Bingh. 176 ; (1828.) *Wells v. Gurney*, 8 B. & Cress. 769 ; (1828.) *Barratt v. Price*, 9 Bingh. 566 ; (1833.) *Spencer v. Newton*, 6 Ad. & El. 623 ; (1837.)

[1] The decision of the Lord Chancellor (Cottenham) upon the appeal, is reported, 4 Myl. & Cr. 280. His Lordship says—after admitting the absence of any authority applicable to the point:—"I think this attachment is bad upon general principle, and with reference to the practice of this Court. The general principle is, that the author of wrong, who has put a person in a position in which he had no right to put him, shall not take advantage of that illegal act, and the Court would not allow a party to take advantage of that illegal act, even although he were not himself the author of it. It being admitted, in the present case, that the custody was an illegal custody, of which the party who made the demand was himself the author, it is no answer to that to say, that you may serve the subpœna for costs upon a person in a particular custody. That means a custody in which he is not improperly placed; and further, it is not a custody in which he is placed by the party himself. I therefore think this is an attempt to take advantage of a man's own wrong; and that, if it were allowed to succeed, it would lead to great irregularity and injustice." As to the regularity of the service of the subpœna for costs, his Lordship says: "The practice of this Court does not permit an attachment to issue upon a mere order to pay. There must be an intermediate proceeding for the purpose of giving the party an opportunity of complying with the order; and the Court therefore requires that he should be served with a subpœna, and that a demand should be made upon him; for it is obvious that he may have the means of payment. Now I cannot think that the order can have been executed in a proper mode, if the party obtaining it has prevented the other party from having the means of complying with it." In *Woodward v. Conebeer*, 1 Haro, 299, Wigram, V. C., after quoting the words printed above in italics remarks: "I may be permitted to doubt whether the words I have quoted are correctly attributed to Lord Cottenham; for, besides the case of *Hutchins v. Kenrick*, (2 Burr. 1040,) which is a direct authority the other way, there are numerous other cases," &c.

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Elizabeth, the wife of Charles Henry Sheldon, having six daughters, and having power to appoint her real estate, by her will, dated the 9th day of October, 1824, duly executed, appointed her estate to Edward Sheldon, James Somerville Fownes and Richard Samuel White, and to their heirs and assigns, unto and to the use of them, their heirs and assigns for ever; upon trust that they should make sale and absolutely dispose of the same, to any person willing to purchase; and should convey and assure the same, to the use of the purchasers, their heirs and assigns; and should, on payment to the trustees of the purchase money, give receipts for the same, which receipts were to be effectual discharges to the purchasers, and should discharge them from being obliged to see to the application, and from being answerable or accountable for the misapplication or non-application thereof. And she directed, that the trustees should stand possessed of the moneys to arise by such sales, upon trust, after payment of the costs and expenses, and of the mortgages affecting the estate, to invest the residue in the public funds, or on government or real securities, and to stand possessed of such moneys, funds and securities, after the death of Charles Henry Sheldon, (who died in 1826,) as concerning one-sixth part thereof, on trust, during the life of her daughter Caroline Weston, to pay the interest, dividends and annual [*80] produce thereof, as the same should be *received, into her proper hands, or into the hands of such person or persons as, notwithstanding her coverture, she should, from time to time, but not by way of assignment, charge or anticipation, appoint to receive the same, for her separate use; and subject to the life interest of the said Caroline Weston, in trust, for such of the then children of the said Caroline Weston, by John Webb Weston, her husband, and of the children thereafter to be born of the said Caroline Weston, by her present or any future husband, as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, in equal shares, if more than one; and if but one such child, then, wholly in trust for such child. And as concerning one other sixth part of the said money, &c., upon trust, for the separate use of her daughter Charlotte Louisa du Massals, during her life; and, subject to her life interest, then upon the like trusts, for the benefit of the present and future children of her daughter Charlotte Louisa du Massals, as were before declared, concerning the sixth given for the benefit of her daughter Caroline Weston and her children: another sixth was given in like manner for the benefit of the testatrix's daughter Frances Matilda, the wife of the Count du Hourmelin, and her children (aliens); and the three other sixths were given respectively, in like manner, for the benefit of her daughters Margaret Frances, the wife of Maximilian du Chastelet, Lucy Catherine Sheldon and Elizabeth Emma, the wife of Charles Antoine Deudon, and their respective children (aliens). And the will contained clauses, providing that in the event of any of the daughters dying without leaving issue who should live to acquire vested interests, the husband of each daughter (four

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aliens) should enjoy a life interest, subject to which, there should be a survivorship; and if all the daughters should die, without leaving such issue, there *was an ultimate trust for the benefit of Charles Henry [*81] Sheldon, if he should be then living, or, if he should be then dead, for the next of kin of the testatrix.

The testatrix died in 1829.

Four of the daughters were married to aliens, and two of them had issue, who were also aliens.

This suit was instituted by the Count du Hourmelin and his wife and child, and Lucy Catharine, the only unmarried daughter, to have the will established, and the trusts carried into execution; and by the decree, dated the 15th of June, 1832, it was declared that the will was well proved, and ought to be established, and the trusts performed; and by a subsequent decree, dated the 16th of April, 1835, it was ordered, that the estates should be sold, with the usual directions.

The Earl of Randor became the purchaser of the estate now in question, for the sum of 13,400*l*. He paid the purchase money into court, and, by an order dated the 22d of June, last, it was referred to the Master to inquire, whether the plaintiffs could make a good title to the estate. The Master, by his report, dated the 16th day of August, 1838, stated, that he was of opinion, that the plaintiffs could make a good title; and that such good title was first shown, on the day on which the abstract of title was first delivered.

To this report exceptions were taken, and it was objected, that interests in land were attempted to be given to the husbands and children of the testatrix's daughters who were aliens; that such interests could not be held as against the Crown, and, consequently, that the Crown had a title over which the vendors had no power.

*Mr. *Kindersley* and Mr. *Elderton*, in support of the exceptions:— [*82] If land be devised to an alien, he cannot hold it against the Crown; and if he contracted for the sale, and filed a bill specifically to enforce the contract, it is clear the bill must be dismissed with costs. The same principle is applicable if the devise were made to an alien, for life, or for any other estate: to the extent of his interest, the devise enures for the benefit of the Crown. Again, if the devise be to A., in trust, or for the use of an alien, the same rule applies; proceeding a step further, and supposing the estate devised to an English subject, in trust, to sell and pay the whole proceeds to an alien, would that particular form of devise make any difference? The alien would, in equity, be regarded as the absolute owner of the estate, and he might insist on the trustees not selling, and on taking the real estate in specie. Again, if the alien were only partially interested in the produce, the same objection would arise; for he might insist on paying off the charges, and retaining the estate. That an alien cannot retain any interest in land as against the Crown, was decided in *Fourdrin v. Gowdey*,^(a) a case which was twice argued be-

(a) 3 My. & K. 383.

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fore Sir John Leach. There, a person having freeholds and leaseholds, directed all his property to be sold and converted into money, and, after charging the mixed fund with his debts and legacies, gave the residue to aliens, one of whom was his heir at law. Sir John Leach held, "that the aliens could no more take an interest in the land (which this would be) than the land itself." He held also, page 398, that an alien acquiring property could not, before office found, confer any right upon another. His Honor, following the rule applicable to charitable bequests, directed the produce of the real and personal estate, after payment of their proportions of the charges, to be apportioned between the Crown and the aliens. The case was considered of such importance, that it was argued a second time by the Attorney General, when his Honor adhered to his former opinion. The authority of *Fourdrin v. Gowdey* is decisive of the present case. Look at the case on principle, no analogy can be stronger than the decisions on the statute of mortmain. It has been argued, that when the produce of land, and not the land itself, is given to a charity, the gift was not void under the mortmain acts; but the courts have held the contrary, and have decided that all interests in land, as money charged on real estate, or to be raised by the sale of real estate, or secured by turnpike tolls, or on county rates and money in any way connected with land, is within the prohibition expressed in the general terms of the statute of mortmain. It is sufficient for the purchaser to show a case of doubt. The important objection is, that the Crown is not, in this suit, represented by the Attorney General, and, therefore, will not be bound by the decree.

Mr. Pemberton, Mr. Parry, Mr. Bethell, Mr. G. Richards, Mr. James Campbell and Mr. G. Turner, contra. If the proposition of the purchaser be true, that an alien can take no interest in the produce of land, the greatest inconvenience would result. In all cases where there is an alien debtor or legatee, and the real estates are charged, an apportionment must be made of the real and personal estate for the benefit of the Crown, and the Attorney General will be a necessary party to all suits for the administration of such estates. Again, when a merchant or trader executes a deed of trust for the benefit of his creditors, or becomes bankrupt, or insolvent, according to this strange and novel doctrine, no sale of the real estate can be made without the concurrence of the Crown.

The decree has declared, that the will is well proved, and that the trusts ought to be carried into execution. The purchaser has notice of all the proceedings; and even assuming the Attorney General to be a necessary party, is it competent for a purchaser buying under a decree now to raise an objection for want of parties? The trustees have the legal estate, and an express power to give valid receipts for the purchase money—the trustees, out of court, could make a good title to the purchaser; the court cannot have a less power; and the purchase money, being paid into court, will not be parted with unless the court sees that all parties interested are present; the purcha-

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ser will thus be completely protected. It is argued, that the case comes within the principle of the mortmain acts; but the cases are perfectly different. An alien may maintain an *elegit* affecting real estates; he may take by contract or purchase, and, although he cannot hold as against the Crown, he has a good title as against every other party; he can hold land until the Crown asserts its right: and if the Crown does not assert its title, the alien will always hold. His title is voidable, but not void, and it is only on the assumption, that the alien *takes*, that the crown can assert any title to the property, and then only from the time of office found. A devise of land to an alien is, therefore, not void, but voidable only; if it were void, the heir, and not the Crown, would be entitled: this is the first distinction between a devise to an alien and to a charity which is void altogether.

Another principle, which distinguishes this from the cases under the mortmain act, is this:—The *objection to an alien holding a real [*85] estate, is purely one of tenure, in order that the Crown may not be deprived of tenants, to perform different military and other feudal services which an alien, owing allegiance to a foreign power, could not perform. The object of the mortmain act has no relation to tenure, that act was passed, as the preamble states, to prevent improvident alienations or dispositions, being made by languishing or dying persons, to the disherison of their lawful heirs. The third section, too, expressly includes every charge or incumbrance affecting or to affect lands.

Fourdrin v. Gowdey was a case, in which the estate descended on the alien, or, rather, would have descended on the alien if he could have taken by descent. The executors had a simple power of sale, but no estate devised to them. Now an alien could not take by descent, and the estate, therefore, vested in the Crown for want of heirs, or by escheat. It is plain, that the heir could not have compelled the crown to sell the real estate, in order that he might enjoy the produce, as personalty; for it is a clear and settled rule, that the Crown cannot be converted into a trustee for any body. The estate, then, vested in the Crown, against whom no trust could be enforced; and, the Crown having both the equitable and legal interest, there were difficulties in *Fourdrin v. Gowdey* which do not exist in the present case. [THE MASTER OF THE ROLLS. There were leaseholds in that case which must have passed to the executors, yet the same principle was applied.]

It is not clear, that any alien will ever have any interest in this property. The devise is to three natural born subjects as trustees; there is no case in which the Crown has called on trustees for the performance of *trusts, on the ground of the *cestui que trust* being alien. The case [*86] of *Burgess v. Wheate(a)* decides, that the Crown has no right, where the *cestui que trust* dies without heirs, to call upon the trustees for a conveyance of the trust estate. In *Henchman v. The Attorney General(b)* there was a devise of a copyhold, on condition to pay 200*l.* to the executor, to be

(a) 1 Eden, 177.

(b) 2 Sim. & Stu. 498. S. C. 3 Myl. & K. 425.

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applied partly to charitable purposes which were void ; and, there being no customary heir, or next of kin, it was held, on appeal, that the Crown was not entitled. How, then, consistently with the cases, can the Crown claim on a failure of the trusts ? The Crown cannot claim a trust estate by way of escheat, because there is a tenant of the land to perform the services. The same reason applies to the present case. The trustees are to sell, and there is to be a conversion out and out : the legatees must, therefore, take the property in the character of personalty. There is a vested legal estate in the trustees, with power to give receipts ; and there is not a present vested interest in any alien : the gift is to the wife, for her separate use ; and she is a natural born subject ; the husband, who is an alien, takes nothing. Even the Attorney General, in arguing *Fourdrin v. Gowdey*,^(a) said, “ Where the purchase and conveyance are made directly from the executors, the purchaser claims as devisee, and the title of the Crown is excluded.”

The purposes of the will require a conversion, which the Crown cannot prevent ; its only right, if any, must be on the purchase money. When once the purchaser obtains the legal estate from the trustees, the Crown [*87] could only assert its title against the land, by means of “the court of equity ; this court would certainly not assist in impeaching a title to property, sold under its decree ; and it has been held, that an equity which can only be enforced by a decree of this court, is not an objection to a title. The doctrine urged by the purchaser is so novel, so dangerous, and fraught with such consequences, that, it is to be hoped, it will receive no countenance in this court when there is no authority or *dictum* in its favor, and when the arguments of the Attorney General in *Fourdrin v. Gowdey* are expressly opposed to it.

Mr. Kindersley, in reply :—It has been suggested, that many evils must result from allowing the objection raised by the purchaser ; the court, however, in determining this question, will not be influenced by such considerations, but must decide according to the existing law, and not on the principle of convenience.

Fourdrin v. Gowdey, is a direct decision on the point in question, the circumstance of there having been leaseholds which vested in the executors, and which did not descend on the alien heir, or escheat, as well as the language of Sir J. Leach, shows, that he did not decide on the ground of the heir being alien, and of there being no devise away from him, but on the very principle which must govern this case.

The mortmain act was passed, not only to prevent the disherison of heirs, but also “to restrain the disposition of lands whereby they become unalienable.” Being against the principles and policy of the law to bring land into mortmain, it has been held, that all charges upon, and interests issuing [*88] out of land, for the benefit of “a charity, are void ; for the same reason, it being contrary to the principles and policy of the law that an

(a) 3 My. & K. 406.

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alien should have any interest in land, every charge on, or interest to arising, out of land, for the benefit of an alien, enures to the use of the Crown, not by escheat, but by prerogative. In *Burgess v. Wheate* the question was, whether there was an escheat *propter defectum tenentis*: here the right of the Crown by prerogative is the question. The analogy is complete between this case, and the cases under the mortmain acts.

However valid the title might be, out of court, by a conveyance from and receipt of the purchase money by the trustees, the case is altered, when the property is sold under a decree, for the purchaser then loses the benefit of the trustee's discharge. The institution of the suit, and the decree of the court, to execute the trusts of the will, and apply the purchase money to arise from the sales of the estate, supersedes the office of the trustees, and renders nugatory, the direction in the will, the receipts of the trustees shall be sufficient discharges to the purchasers. The court never guarantees, or makes a good title; and it is the first duty of a purchaser under a decree, to see that all persons interested in the estate, are properly represented in the suit; no absent person can be bound by a proceeding, to which he is not a party; and, if it should turn out, that the Attorney General, in right of the Crown, has an interest in this property, or in the produce, he might hereafter come forward and unsettle all that has been done. In a sale under the court, the proceedings in the suit, are considered, by the practice of conveyancers, as much a part of the title as any of the title deeds. The purchaser, however, does not insist on the Attorney General being made a party, but rather suggests it, for the convenience of the vendors, in order that they may "be enabled to obtain a decree binding on all parties interested, and to [*89] make a perfect title.

1839 : *January 28.*—THE MASTER OF THE ROLLS (after stating the case):—It is obvious, that if the trusts be performed as the testatrix intended, the land will remain vested in the trustees, till a conveyance is made to the purchaser, and never can be vested in any alien, and that the purchase money, after paying costs and satisfying incumbrances, being invested in stock, the interest of the aliens will be in such stock, and not in land.

It appears also, that, whether we regard the land, or the stock into which the testatrix intended it to be converted, there is at the present time no vested interest in any alien. The vested interests are in English subjects. The interests in aliens are contingent and expectant on the determination of those vested interests.

The English subjects, in whom the interests are vested, are entitled to have the trusts performed, and no claim of the Attorney General, to have secured for the Crown, the interests which were intended for aliens, could have prevented the decree for sale. It is not a case, in which they being entitled, or the Attorney General or the Crown being entitled, can exercise an option, and elect that there shall be no conversion. There is a decree for sale; the

1839.—Du Hourmelin v. Sheldon.

and when it is complete, the money will be the only aliens will have any interest. But it is argued, that at the death of the testatrix, and as it must remain all be completely made, the land is the source, from, or stock, in the shares of which the aliens are to be interested, is to be realized; and that, in that respect, the aliens have an interest in the land. And, as the gift of an interest in land to an alien, may be good, and the alien, though capable of taking the gift, cannot hold it for his own benefit, but for the Crown only, it is contended, that the Crown has here a right to that interest, and, therefore, to an interest in the money, or stock, which is to arise from the sale of the land.

In the case of the *King v. Holland*, reported in Ayleyn, p. 14, and in other books, (a) it was the expressed opinion of one of the Judges, though it was not then necessary to decide the point, that an alien could not compel seoffees to execute a use; and of another of the Judges, that though the King should have the use, yet he could not seize the land itself, but by equity might have a decree for the land; or, in other words, might in a court of equity, compel the trustees to execute the trust for his benefit. This doctrine is applicable to a case, in which land is given to a trustee, to be held by him, in trust for an alien; [1] in which case, the alien takes in the land, a permanent equitable interest, which might be attended by inconveniences, nearly the same, as those which are considered to attend a permanent legal interest vested in an alien; but the same doctrine, is not necessarily applicable, nor do similar reasons extend, to a case, in which no interest in land, was intended ever to vest in the alien; in which, the legal estate is vested in the trustees, and intended to pass from them to the purchaser; and in which, the interest of the alien, and his right, if right he has, is only to have the land converted into money, and is so far of a transitory nature, that it endures only, till [*91] the *purposes of the donor can be performed, by the due execution of the trusts he has created.

It has been held, that the disability of an alien to hold lands, for his own benefit, is not in the nature of penalty, or forfeiture, but arises from the policy of the law; and none of the various reasons, on which the Judges have considered the policy of the law relating to aliens to be founded, seem applicable to such a case as this. When the land is converted into money, as the trust intends, no objection in respect of tenure, fealty, or allegiance, remains. And it has been considered to be in conformity with the policy of the law, that aliens should be interested in the English stocks, or funds.

The law giving to an alien the right of holding money or stock, and refusing to him the right of holding land, any man desiring to benefit an alien, may, if he pleases, sell his land, and give the purchase money, or the stock

(a) 1 Rolles Abridgment, 19 b. Styles, 20, 40, 75, 81, 90, 94.

[1] Vide *Leggett v. Dubois*, 5 Paige, 114.

1839.—Du Houmelin v. Sheldon.

which it may produce, to an alien, or to a trustee for his benefit. In so doing, he would do nothing contrary to the policy of the law; and it would be singular, if being entitled to do this by himself, he could not accomplish the same purpose, by means of another, as his agent or trustee, created by deed or will, for the purpose of sale and conversion, because, during the time which may elapse, before the conversion can be completed, the alien is, by the peculiar doctrine of this court, considered to have an interest in the land which is to be converted:—i. e. an interest that the land should be sold to persons who can legally hold it, in order to raise the money, which he, the alien, can legally hold.[1]

"I confess that I am at a loss to understand, in what way the policy [*92] of the law can be applied, so as to give to the crown, any part of the money, which, in such a case, is intended as a provision for the members of the testatrix's family, though some of them happen to be aliens. The policy of the law, in relation to mortmain, is subject to considerations, so entirely different, that they do not appear to me, to be at all applicable to the case.

The only authority on which the purchaser relies, and which appears to me to occasion any difficulty, is the case of *Fourdrin v. Gowdey*,^(a) in which Sir John Leach considered a gift of this kind, as a gift of land, subject to charges; and held, that aliens could no more "take" an interest in land, than the land itself. He must have meant to use the word "hold," instead of the word "take," because it is clear, that aliens may take land, though they cannot hold it against the King.[2] But in *Fourdrin v. Gowdey*, the question principally argued, related to the effect of letters of denization; and the question which bears upon the point arising in the present case, was much less considered. Moreover, there was no estate devised to trustees, for the purpose of enabling them to sell and convey, but only a direction to the executors to sell; and the heir at law being an alien, the real estate could not descend to him; and the circumstances afforded a ground for the decision in *Fourdrin v. Gowdey*, which does not exist in the present case. Having regard, however, to the expressions which fell from Sir John Leach, and his decision as to the leaseholds in that case, I think, that he would probably have considered such an interest, as is given to the aliens in this [*93] case, as an interest which might be claimed by the crown; and, in that respect, *Fourdrin v. Gowdey*, if to be sustained, appears to me to be an authority for the exceptions, which are taken to the Master's report in this case.

But it is a single case—in the consideration of it, the policy of the law in regard to mortmain, seems to have been, in some degree, confounded with

(a) 3 Myne & Keen, 383.

[1] Vide *Anstice v. Brown*, 6 Paige 454.

[2] Vide *Moore v. White*, 6 Johns. Ch. Rep. 360. *Leggett v. Dubois*, 5 Paige, 118.

1839.—In re Pasmore.

the policy of the law as to alienage ; and as, upon the most careful consideration of it, I am unable to acquiesce in the reasons upon which so much of the decree as is applicable to the present case, is founded, or to find any others which are satisfactory, I do not think that I ought to be governed by it.

It does not appear to me, that, in respect of the species of interest in land which is here given to aliens, the Crown is entitled, by its prerogative, either to come into equity to have the trust executed, in order that the benefit of it, in money or stock, may be taken from the persons, to whom it was given by the testatrix, and secured to the Crown ; or to insist, that the trust shall not be executed, as intended, but that the interests vested in the aliens, before conversion, shall remain in the same form, and be, in that form, taken by the Crown, because an alien cannot continue so to hold it.

And, on the whole, I am of opinion, that the exceptions ought to be overruled.

Exceptions overruled.[1]

[*94]

*IN RE PASMORE.

1839 : February 23.

Where a client, resident abroad, applies for the taxation of his solicitor's bill of costs, on his undertaking to pay, he must give security for the costs of the proceeding.

THIS was a petition for the delivery and taxation of a solicitor's bill of costs, and for the delivering up of the deeds and papers in his custody belonging to the client ; the client, by his petition, submitting to pay what might be found due.

The petitioner, as it appeared by affidavit, " had been for a long time, and still was, resident at Ostend, in the kingdom of Belgium."

Mr. *Stinton*, for the petitioner.

Mr. *James Russell* objected, that the petitioner, being resident out of the jurisdiction, must first give security for costs ; *Drever v. Maudesley*.(a)

That the undertaking, under the 2 G. 2, c. 23, of a party resident abroad, was of no value, as an attachment, issuing in case of default, would be ineffectual ; and he contended that the petitioner ought, therefore, to give some security for the payment of the amount found due from him.

The point, he said, had been decided by Sir C. C. Pepys.(b).

(a) 5 Russ. 11.

(b) *Bodecote v. Bostock*, Rolls, June 17, 1835.

[1] Affirmed by Lord Cottenham, November, 1839, 4 Myl. & Cr. 525. If an agent for the collection of a debt due to an alien, take a conveyance of land in his own name in payment of such debt, without any authority from his principal, and without any written declaration of trust, there is a valid trust in favor of the alien ; and a court of equity will not permit a resulting trust to be created in favor of the state, by escheat ; but will decree the land to be sold, and converted into money, for the purpose of giving the alien the benefit thereof, as personal estate. *Anselme v. Brown*, 6 Paige, 448.

1839.—Bailey v. Todd.

THE MASTER OF THE ROLLS said, that, as the party was not amenable to the jurisdiction of the court, there *was no doubt that [*95] he must give security for the costs of these proceedings, unless it appeared that the solicitor had in his hands a sufficient security for them.

The amount of security to be given was discussed, when Mr. James Russel consented to accept a security to the extent of 40%.

BAILEY v. TODD.

1839 : March 15.

It is irregular to confirm the Master's report, approving of a contract for sale of an estate being carried into effect, by a petition of course, with the consent of the clerks in court of all parties. Such a report ought to be confirmed by a special petition, stating all the facts.

It was referred to the Master to inquire and state to the court, whether it would be for the benefit of all persons interested in the real and personal estate of the testator, that two agreements entered into by the plaintiff, for the sale of certain copyholds, part of the testator's estate, should be carried into execution.

The Master reported in the affirmative ; and his report was confirmed by an order of course, made upon petition, with the consent of the clerks in court of all parties.

On the application of the purchaser, it was ordered, that he should be at liberty to pay his purchase money into court, and be let into possession, and that the proper conveyances should be made.

The registrar, in drawing up this order, objected that the Master's report had not been regularly confirmed ; and that it ought to have been confirmed by order of *the court, upon a special petition, stating the facts, [*96] and praying the confirmation of the report, and consequential directions, and not by an order of course.

Mr. *Geldart*, on behalf of the purchaser, now mentioned the point to the court, and submitted that the mode of confirmation was correct, all parties having consented.

THE MASTER OF THE ROLLS said, he thought the report ought to have been confirmed by a petition, stating the facts, otherwise due attention would never be called to what the Master had approved of ; that it was the duty of the court to exercise a superintending care over the matters approved of by the Master, and that it was not a matter of course for the court to confirm a measure, because the Master approved of it. That, by the established practice, a special petition to confirm a report of this kind, was one of the cautions adopted by the court, which could not be dispensed with ; and that such a petition must, therefore, be presented.[1]

[1] Vide 9 Sim. 174, n. 1.

1838.—England v. Downs.

ENGLAND v. DOWNS.

1838: March 23.

A husband and wife were joined as co-plaintiffs in a suit relating to the separate property of the wife, and the defendant objected, by his answer, to the misjoinder of the plaintiffs. The cause coming on to be heard, the court after hearing the case refused to dismiss the bill; but, upon the husband giving security for all the costs, permitted the bill to be amended, by adding a next friend, and making the husband a defendant.

THE plaintiff, England, and his wife, were joined as co-plaintiffs in a suit relating to the separate estate of the wife only. An objection was raised by one of the answers, for misjoinder, and the defendant claimed the same benefit of the objection as if he had demurred; and insisted that the bill ought to be dismissed on that ground.

[*97] *Wake v. Parker*, (a) *Andrews v. Craddock*, (b) *Sigel v. Phelps*, (c) *Raffety v. King*, (d) were cited.

THE MASTER OF THE ROLLS said he must hear the case, as he considered it a matter of discretion whether the bill should be dismissed; and after hearing the circumstances, his Lordship refused to dismiss the bill; but ordered that, upon England, the husband, giving security for the costs incurred, and of the day, and any subsequent costs to be incurred by amendment, the wife should be at liberty to amend, by adding a next friend, and making the husband a defendant.[1]

Mr. *Pemberton*, Mr. *C. P. Cooper* and Mr. *Dixon*, for the plaintiff.

Mr. *Tinney* and Mr. *Simons*, for the party raising the objection.

Mr. *Kindersley* and Mr. *James Russell*, Mr. *Elderton* and Mr. *Spurrier*, for other defendants.

It was arranged that the order was not to be drawn up for the present, to await the decision of the Lord Chancellor in *Tullett v. Armstrong*. [2]

(a) 2 Keen, 59.

(b) Gilb. Rep. 36.

(c) 7 Sim. 239.

(d) 1 Keen, 601.

[1] That husband and wife should not be co-plaintiffs in a suit as to the separate estate or interest of the wife, and how the objection to the misjoinder is to be raised; see the Editor's notes, and the cases cited, 1 Sim. & Stu. 188, n. 1; 1 Keen, 9; n. 1; 2 Keen, 75, n. 1. "Persons having adverse or conflicting interests in reference to the subject matter of the litigation, ought not to join as complainants in the suit. And where a bill is filed by the husband in the name of himself and wife, it is considered the bill of the husband merely; so that the decree made in such suit, is not binding upon the wife in any future litigation. For that reason, where a bill is filed by the husband and wife in regard to her separate estate, in which the husband has no common interest with her, the defendants, if they think proper to do so, may insist that the wife shall prosecute in her name by her next friend; so that the defendant may not be subjected to the expense of a further litigation in case they succeed in their defence to this suit. On the other hand, if the husband seeks to deprive his wife of an estate held in trust for her separate use, he cannot obtain a decree for that purpose by joining her as a complainant with himself in his suit against her trustees; 'but should make her a party defendant in such suit.'" Walworth, Ch., *Grant v. Van Schoonhoven*, 9 Paige, 257.

[2] For the decision in *England v. Downs*, upon the merits: see 2 Beav. 522.

1838.—Lewin v. Moline.

*EX PARTE HAGGER RE MERRY'S TRUST.

[*98]

1839: January 30, 31; March 19.

The executor of the survivor of three trustees declined to prove his will: Held, that the case was within the 1 W. 4. c. 60.

THE question was, whether the case came within the stat. of 1 W. 4, c. 60.

The testator gave to his three executors a sum of 1000*l.* consols, in trust for the petitioner, for life. Mr. Shee, the surviving trustee, died in 1838, having, by his will, appointed his two sons his executors.

The fund remained in the bank books, in the names of the three executors of the first testator; and the petitioner having personally requested one of the sons of the surviving executor, by notice in writing, to prove the will and transfer the fund to new trustees, and he having declined, and the other being out of the jurisdiction, this petition was presented for the purpose of obtaining the usual reference to the Master, under the act, and for the appointment of new trustees.

Mr. Rogers, in support of the petition, relied on *Ex parte Winter*.(a)

January 31.—THE MASTER OF THE ROLLS said he considered the case of *Ex parte Winter* in point; and he was the more disposed to act on it, in consequence of the order having been made after the Bank of England had been heard in opposition.

*LEWIN V. MOLINE.

[*99]

1838: December 9.

It is contrary to the practice, to advance a foreclosure suit to be heard as a short cause, unless with the consent of the defendant.

MR. EVERETT applied, on the authority of *Mountford v. Cooper*,(b) and *Hutchinson v. Stephens*,(c) to have a foreclosure suit advanced and heard as a short cause, on his certificate. The defendant did not consent to the application, nor did his counsel state that this was not a short cause.

THE MASTER OF THE ROLLS said, that after the decision of Sir T. Plumer, in *Rashleigh v. Dayman*,(d) and the long continued practice in conformity with it, and although he thought that the order then made had been misunderstood, he did not consider himself at liberty to grant the application.

Mr. R. W. E. Forster, for the defendant, afterwards applied for costs of the application, which the Master of the Rolls granted, but with regret.(e)

(a) 5 Rom. 284. (b) 1 Keen, 464. (c) Ibid. 659, and 2 My. & Cr. 452. (d) 2 Mad. 147.

(e) A similar order was made in *Aldworth v. Robinson*, Rolls, 21st February, 1839, Mr. Pem-

1838.—Tate v. Clarke.

[*100]

TATE v. CLARKE.

1838; November 21, 22; December, 20.

Devise to testator's widow, for life, with remainder to trustees and their executors, to pay costs, &c., and to divide the residue of the rents, amongst all the testator's brothers and sisters "who should be living at the time of the decease of his (testator's) wife, and to their issue, male and female, after the respective deceases of his said brothers and sisters, for ever; to be equally divided between and among them." Held, that the words "issue male and female," were to be construed as words of limitation, and not of purchase; and that the children of a sister of the testator, who died in the lifetime of the widow, took no interest under the devise.

A similar decision made with respect to personal estate.

This cause came before the court on a general demurrer to the whole bill, which stated the will of the testator, George Williams, dated the 27th of May, 1784, as follows:—"I give, devise and bequeath all that my freehold messuage, tenement or dwelling house with the appurtenances, and the stables, out-houses and garden ground, together with all buildings, rights, members and appurtenances whatsoever, to the same belonging, which I lately purchased of Thomas Pochin, of Loughborough, in the county of Leicester, Esq., situate, lying and being at Hammersmith, in the county of Middlesex, as the same are now in lease to Mr. John Lewis of Hammersmith aforesaid and occupied by him, and all other my freehold estates, whatsoever and wheresoever, unto my dear and loving wife, Lucetta Williams, for the term of her natural life, independent and without prejudice to the control, debts or engagements of any future husband or husbands she may hereafter happen to marry, and that her receipt alone shall be a good and sufficient discharge to the tenants or occupiers of the same premises, it being my will and mind, the same shall remain free and clear to her own sole use and benefit, and not otherwise; she committing or suffering no manner of waste thereon, or doing any act or deed whereby wilfully to lessen the value or income of the same estates; and from and after her decease, I give, devise and bequeath the same unto Mr. Henry Lewis, son of the said John Lewis,

of Hammersmith aforesaid, and Mr. John Clarke, of Southampton [*101] Street, in the parish of St. Paul, Covent Garden, haberdasher, and the survivors and survivor of them, their executors and administrators, upon trust in the first place, that they, my said trustees, do and shall, out of the rents, issues and profits thereof, pay to and reimburse themselves and himself, all costs, charges, damages and expenses, which they or any or either of them shall pay, expend or be put unto, for or on account of the said premises or the trust hereby in them reposed; and in the next place, to pay and divide the residue and remainder of the said rents, issues and profits of the same premises and every part thereof, unto and amongst all and every my brothers and sisters, who shall be living at the time of the decease of

berton and Mr. G. Russell, for the plaintiff, and Mr. Roupell, for the defendant; but see the 4th general order, 9th May, 1839.

1838.—Tate v. Clarke.

my said dear wife, and to their issue, male and female, after the respective deceases of my said brothers and sisters, for ever, to be equally divided between and amongst them, without preference the one to the other, share and share alike, and to and for no other use, intent or purpose whatsoever." He then gave the dividends and interest arising from his money in the funds, or other security, to his wife, for life, and, after charging a small annuity thereon, he proceeded, "and from and after the decease of my said wife, Lucetta Williams, I give, devise and bequeath the same interest and increase, subject to the said payment to my said mother, unto and to the use of the said Henry Lewis and John Clarke, their executors and administrators, upon trust, to pay and apply the same unto my said brothers and sisters, in the same manner as it is directed with regard to the rents and profits of my freehold estate." And as to all the rest and residue of his estate and effects, of what nature or kind soever and wheresoever, the said testator gave, devised and bequeathed the same, unto his said wife, for her own use and benefit.

The testator died in 1784, leaving his wife, and his brother, John Williams, and two sisters, Margaret, the wife of Richard Kimber, and Elizabeth Williams, him surviving.

"The testator's brother and sisters all died in the lifetime of his [*102] widow Lucetta. John Williams and Elizabeth Williams died without issue, but Margaret Kimber left John Kimber and Elizabeth Tate, her only issue.

The widow Lucetta married John Clarke, and died in 1837, and she was represented in the suit by the defendants, who were the children of her second marriage.

The bill, which was filed by the two children of Margaret Kimber, prayed that the trusts of the will of the testator might be performed, and for an account of his money invested in the funds and other securities, and of the rents and profits of the freehold at Hammersmith, accrued since the death of Lucetta, and that the rights of the plaintiffs thereto might be declared.

The defendant, James Clarke, who claimed the property under the will of Lucetta, the widow of the testator, filed a general demurrer to the whole bill, for want of equity.

Mr. *Tripp*, in support of the demurrer, contended, that the words "issue male and female" were words of limitation and not of purchase; that the brother and sisters of the testator would have taken an estate tail in the realty, and an absolute interest in the personalty, in the event of their being living at the death of the testator's widow; that this gift had failed by their deaths in her lifetime, and that the property thus passed under the residuary gift to the widow absolutely. *Jesson v. Wright*, (a) *Doe v. Harvey*. (b)

Mr. *Pemberton* and Mr. *Blunt*, contra. The governing rule in the construction of wills is, that the intention *of the testator must [*103]

(a) 5 Mau. & Sel. 95. S. C. 2 Bligh. 1.

(b) 4 Barn. & Cr. 610.

 1838.—Tate v. Clarke.

prevail, and all general rules of interpretation must give way to a contrary intention collected from the whole context of the will; thus the words "to A. and his issue" have long been held to give an estate tail, yet, if the testator superadds words, showing an intention, inconsistent with the devisee taking an estate tail, such intention will prevail over the general rule. *Doe v. Collis*,^(a) *Doe v. Laming*,^(b) *Doe v. Burnsall*,^(c) *Doe v. Elvey*.^(d) The intention of the testator was, that his brothers and sisters should take, if they survived his wife; and if they died in her lifetime, then, that their children should enjoy the property forever; he could never have intended to disinherit the children, merely because their parents died in the life of the widow. This, however, would be the effect of holding they take by representation. Again, the devise is expressed in a mode quite inconsistent with the notion, that the children were to take by inheritance, through their parents; the devise to the issue is in a different sentence from that to their parents—it is to take effect *after* the respective deceases of the brothers and sisters—it is given *forever*, or in *fee*, and is to be *divided equally between and amongst them, without preference*; in other words, the issue male and female, are to take equally and together. This intention could not be effected by giving an estate tail to the ancestor, in which case the estate would not be divided, but the eldest male would take the whole; the males and their issue would take in priority and exclusively of the females; besides this, there is no gift over in default of issue, a circumstance much relied on in former cases. The devise to the wife is of a legal estate, and then there is a devise to the trustees, which is to take effect at all events, and is [104] not subject to the contingencies of the brothers surviving the widow; the beneficial interest must be co-extensive with the devise to the trustees. To effectuate the intention of the testator, it is necessary that the children of the brothers and sisters should take by purchase, and not by descent; and, without defining the extent of their estate, it is sufficient, for the purpose of overruling the demurrer, to establish, that they have some interest in the testator's estate. They also cited *Right v. Creber*,^(e) *Doe v. Goff*,^(g) *Morse v. Lord Ormonde*,^(h) *Christopherson v. Naylor*.⁽ⁱ⁾

Mr. Tripp, in reply, cited *Gallini v. Gallini*.^(k)

THE MASTER OF THE ROLLS said, his present impression was, that the demurrer was sustainable, but he would consider the case.

December 20.—THE MASTER OF THE ROLLS:—This case comes on upon demurrer. The plaintiffs, Elizabeth Tate and John Kimber, are the children of Margaret Kimber, who was one of the sisters of George Williams,

(a) 4 Term Rep. 294.

(b) 3 Burr 1100.

(c) 6 Term Rep. 30; and 1 Bos. & Pul. 215.

(d) 4 East, 313.

(e) 5 B. & Cr. 866.

(g) 11 East, 668. (h) 5 Mad. 99. 1 Russ. 362.

(i) 1 Mer. 320.

(k) 5 B. & Adol. 621. S. C. 3 Ad. & Ell. 340.

 1838.—Brookes v. Burt.

the testator in the cause. The defendant, James Clarke, is the executor of Lucetta, who was the wife of the testator.

The question is, whether, in the events which have happened, the plaintiffs are entitled to any interest in the testator's estate.

The plaintiffs, Mrs. Tate and John Kimber, claim to be entitled to the whole, or at least to a share, of the real and personal estate given to Lucetta for life. *The defendant insists that the word "issue," as [*105] employed in the will, is a word of limitation, and that the plaintiffs, as issue of a sister who died in the lifetime of the widow, are not entitled to any interest under his will.

The word "issue," is a word of limitation if the context of the will does not afford sufficient reasons to construe it otherwise. In the present will, I think that it cannot be construed in a sense different from "heirs of the body;" and if the words "heirs of the body" had been employed, I think that neither the superadded words, *prima facie* denoting distribution,^(a) nor the want of a gift over, in default of issue,^(b) would have afforded sufficient reasons for construing the words otherwise than as words of limitation. This case is not so strong as some others which have been decided; for the words of distribution may be applied to the brothers and sisters who were intended to be first takers, and the words "their issue" must mean the issue of those who were to take, and they are expressly those who should be living at the death of the wife: at which time there was no brother or sister living. I cannot help thinking, that the operation of the will is not in accordance with the testator's intention,—it is most unlikely, that he should have intended to make no provision for the children of a brother or sister who died in the lifetime of his widow; but being unable to find in this will, such clear indications of intention, that the technical words which are employed should not have their ordinary effect, I am under the necessity of saying, that it appears to me, the plaintiffs have no interest in the estate, and, consequently, that the demurrer must be allowed.

Demurrer allowed.

*JOHN BROOKES and MARY his Wife v. HANNAH BURT. [*106]

1838.—November 7.

One of two tenants in common brought an action of ejectment against A. B. to recover possession of some property, but discovering (as the bill alleged) that there was an outstanding term which, the defendant intended to set up, he filed a bill, praying a declaration of his right to a moiety of the estate, and for the delivery of the estate and title deeds, and for an account of the rents: Held, on demurrer, that, from the frame of the record, the other tenant in common was a necessary party; but that the trustee of the outstanding term was not.

THIS case came before the court upon general demurrer to the whole bill, which stated, that the testator, James Burt, by his will, dated the 25th of

(a) See *Jesson v. Wright*, 2 Bligh. 1.

(b) See *Doe v. Featherstone*, 1 B. & Adol. 344.

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March, 1813, devised all his freehold and leasehold property, as to one-third, to his son, William Burt, in fee; as to one other third, to his daughter, Jane Wavell, in fee; and as to the remaining one-third, to the plaintiff, Mary Brookes, in fee.

The testator died in 1814, and, in 1822, the plaintiff Mary, afterwards the wife of John Brookes, conveyed her one-third, as to one moiety, in trust, for William Burt; and, as to the other moiety, in trust for Jane Wavell.

In 1823, a deed of partition was executed between William Burt and Mrs. Wavell, by which certain portions of the property were conveyed in severalty to William Burt and Mrs. Wavell respectively; but some other portions remained undivided.

William Burt died in 1836 intestate, and without issue, leaving the defendant Hannah Burt, his widow, and leaving the plaintiff Mary Brookes, and James Wavell, eldest son of Mrs. Wavell, his co-heirs at law, when, as it was alleged by the bill, the plaintiff, Mrs. Brookes, became entitled to one-half of the property, held by William Burt in severalty, and to one-fourth of the other property, to which the deed of partition did not extend.

[*107] *The bill then stated that, notwithstanding the title of the plaintiffs in right of Mary Burt, the said Hannah Burt, after the death of her husband, entered into possession, and into the receipt of the rents and profits of the property, held in severalty, and of the property not conveyed in the deed of partition; and that the plaintiffs had commenced an action of ejectment, which the defendant, Mrs. Burt, defended.

The bill then proceeded to state, that, before the trial, the plaintiff discovered that the property was subject to an outstanding term, which was vested in a Mr. Worsley, which the defendant threatened and intended to set up, for the purpose of defeating the claims of the plaintiffs.

The bill charged, that James Wavell was at present residing out of the jurisdiction of the court; but it did not pray process against him, when he should come within the jurisdiction: and it prayed that the plaintiffs might be declared entitled in right of the plaintiff, Mary Brookes, to one undivided moiety of the premises, held by Mr. Burt in severalty, and to one undivided fourth of the other property, held in common by him; and that the defendant might be decreed to deliver up the possession of the same to the plaintiffs, in right of the plaintiff, Mary Brookes, accordingly, together with the title deeds thereof; and that an account might be taken of the rents and profits received by the defendant, since the death of William Burt, from or on account of the said share of the plaintiffs, of and in the said premises, and that she might be decreed to pay, what, on taking the said accounts, should be found due to the plaintiffs, or else, that the said defendant might be restrained by injunction, from setting up the outstanding terms

[*108] for the purpose of defeating the plaintiffs in the action at law, or any other action or actions which they might be advised to bring for the recovery of their share of the said premises, or any part

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thereof; and that all proper accounts might be taken, and inquiries made, and directions given, which might be necessary for effecting the purposes aforesaid and for general relief.

To this bill the defendant put in a general demurrer for want of equity, on the ground that James Wavell and James Worsley, who were necessary parties to the bill, had not been made parties thereto.

Mr. *Kindersley* and Mr. *W. C. L. Keene*, in support of the demurrer, contended, that James Wavell, who was entitled to the other moiety of the property, and Worsley, in whom the outstanding term was vested, were necessary parties to the suit. If the bill had prayed a discovery only, or for an injunction to restrain the defendant from setting up the outstanding term, it might not have been necessary to make them parties; but here the bill prayed for a declaration of right, the delivery of the possession of the estate, and of the title deeds of the property; and for an account of the rents and profits;—matters in which the absent parties were interested; and that, therefore, this suit, which sought to deal with the inheritance, was defective for want of parties: they cited *Jones v. Jones*,^(a) *Baker v. Harwood*.^(b)

Mr. *Pemberton* and Mr. *Puller*, contra:—The proposition of the defendant is this, that if there be twenty tenants in common of an estate, and a stranger gets possession, one of the tenants in common cannot recover the possession, or the rents from the stranger, without making the other nineteen persons, with whom "he has no dispute, parties to his suit. An ejection [*109] bill is a substitute for an action of ejectment, and must be governed by the same rules; and it is clear that, at law, one tenant in common can sue alone for his share. *Doe d. Gill v. Pearson*,^(c) *Doe d. Raper v. Lonsdale*,^(d) *Doe d. Marsack v. Read*.^(e) Even in equity, where an undivided share is ascertained, a party may sue for it, without making the persons entitled to the other shares parties; *Smith v. Snow*,^(g) a decision recently followed in this court in *Hutchinson v. Townsend*.^(h)

The bill alleges, that Wavell is out of the jurisdiction, and not being amenable to the process of the court, it is not necessary to make him a party; *Haddock v. Thomlinson*.⁽ⁱ⁾ [The Master of the Rolls said, there was a case, decided by Sir John Leach, in which he held it was proper to pray process against a necessary party, although he was out of the jurisdiction.^(k)]

- (a) 3 Mer. 161, 172. (b) 7 Sim. 373. (c) 6 East, 173. (d) 12 East, 39.
(e) 12 East, 57. (g) 3 Mad. 10. (h) Rolls, Dec. 16th, 1836. (i) 2 S. & Stu. 219.
(k) *MUNOZ v. DE TASTET*.^(*)

V. C. 1826: January 25. 1827: April.

It is not enough to state, that persons who, in respect of interest, are necessary parties, are out of the jurisdiction: the bill must go on to pray process against them.

The bill was filed by the syndic commissary, or assignee, of Riba & Co., against De Tastet &

(*) From Mr. J. Russell's note.

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- [*110] *As to the trustee of the outstanding term not being made a party, the demurrer admits that the defendant has no title; yet she objects that the plaintiff does not bring before the court a person who is ad-
- [*111] mitted to have *no interest in the matter; she insists on retaining the estate, and the rents which she has unjustly received, until the plaintiff shall bring his trustee before the court. There is no estate in the country, in respect of which there are not several outstanding terms; and the inconvenience would be excessive, if the rightful owner could not proceed

Co., for an account of moneys received by the latter firm, on account of Riba & Co., as their correspondents and agents.

Demurrer, for want of parties.

Mr. Koe, for the demurrer.

Mr. *Bickersteth*, contra, insisted, that by the law of Spain, as stated in the bill, the persons who, according to the demurrer, ought to have been made parties, had no interest in the accounts prayed.

The Vice-Chancellor held, that, upon the result of the account, those persons might have an interest in the funds, which were the subject of the suit.

Demurrer allowed, and leave given to amend.

The amended bill stated, that the defendant pretended that a certain sum (part of the funds in question) did not belong to Riba & Co., but that eleven other persons (naming them) had some right, or interest in or to the same. It then charged, that those eleven several persons had no right to, or interest in the said sum, "for that they, the said José Ayzenana, &c. (naming all the said eleven persons) are all of them resident abroad, out of the jurisdiction of this honorable court." Process was not prayed against any of those eleven persons.

To the amended bill, the defendant De Tastet put in a plea. The averments of the plea were, in substance, that the eleven persons named in the bill, had an interest in the sum as to which an account was prayed; and that they were entitled to call upon the defendants to account for the application thereof; the conclusion of the plea was, that the defendants ought not to be compelled to answer until the eleven persons before named, and the representatives of such of them (if any) as were dead, were made parties to the suit.

The question, on the argument of the plea, was, whether it was sufficient to state in the bill, that those eleven persons, who, if within the jurisdiction, would have been necessary parties, were out of the jurisdiction, without praying process against them.

Mr. Koe, in support of the plea.

Mr. *Bickersteth*, contra, argued, that when a party was out of the jurisdiction, it was nugatory to pray process against him when he came within the jurisdiction; that the common practice was not to pray process against a party out of the jurisdiction; that this was a case of peculiar hardship, in which the defendant was, by every possible means, delaying putting in an answer, in order to deprive the plaintiffs of the means of compelling him to pay a large sum into court, and that the great number of persons against whom, according to the argument of the plaintiffs, proceedings ought to be prayed, was a reason why the court, unless constrained by the clearest authority, should not allow the objection to prevail.

THE VICE-CHANCELLOR. It is not enough to state, that persons, who, in respect of interest, are necessary parties, are out of the jurisdiction; the bill must go on to pray process against them. One reason for this is, that they may have an opportunity of appearing to the suit, and taking, as parties to the suit, what course in it they may deem most for their advantage. This they cannot do if process is not prayed against them.

Plea allowed, but leave given to amend. (*)

(*) This decision was cited before Lord Redesdale, in the House of Lords, and approved of by him, and was afterwards followed by Sir C. C. Pepys in *Taylor v. Fisher*, Rolls, March 19, 1835.

1838.—Close v. Wilberforce.

against a wrong-doer, either at law or in equity, to recover his estate, without tracing out the outstanding terms, and making the trustees of them parties to his proceeding. But it is clear that the plaintiff is entitled to some part of the relief prayed, and at the hearing he may waive part of the relief, and obtain the rest; the demurrer, therefore, covers too much, and must be overruled.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS :—It appears to me that this demurrer must be allowed. It is no answer to the claim of the plaintiffs to say, *that there are some things which cannot be maintained; but, on the [*112] other hand, where the demurrer is for want of parties, it is not sufficient for the plaintiffs to say, that there is some part of the relief which can be abandoned at the hearing.

This bill does not ask that which ejectment bills usually ask: it prays for accounts, and the delivery up of title deeds, which is more than is usually prayed by a common ejectment bill. The deeds cannot be delivered up in the absence of the parties who are interested. I conceive that Wavel is a necessary party; but that the plaintiff is under no obligation to make Worsley a party. The demurrer must be allowed, without costs.

CLOSE v. WILBERFORCE.

1838: December 8, 11.

Equitable assignee of leaseholds held liable at the suit of the lessee, after the expiration of the term to the breaches of covenant committed during his possession, although such lessee was no party to the contract for purchase, and it was stipulated, that the purchaser should not be entitled to an assignment.

By an indenture, dated the 28th of May, 1823, a Mrs. Jefferson demised to the plaintiff a farm, &c., at Kilburn for a term of twelve years and a half, wanting five days, at a rent of 300*l.* a year. The lease contained various covenants, some usual and some unusual. The plaintiff, in the year 1825, sold the lease to the Westminster Dairy Company, and it was accordingly assigned by deed poll to the trustees of the company, subject to the rents and covenants, &c. The affairs of the company not having succeeded, in July, 1826, they caused the premises to be put up for sale, and particulars of sale were prepared by the auctioneer, but a sale was not then effected.

*In September, 1826, the defendant, who had been a director of [*113] the company, and had previously purchased of them the stock, &c., agreed to purchase of the company the leasehold premises. His contract for purchase was contained in one of the printed conditions of sale, with certain variations therein, which are next stated.

The particular, as altered, after describing the property, proceeded as fol

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lows :—"The estate is held on lease for a term, of which nine years and a half, less five days, were unexpired at Lady-day, 1826, at a rent of 300*l.* per annum, and all quit and copyhold rents, dues, duties and services in respect of these and other parts of the premises of Thomas Ripley, Esq., deceased. The tenant is bound to repair, and the premises cannot be used as a coffee house, tavern, ale house, tippling house, or tea gardens. The purchaser is to take the fixtures, manure, dressings, and half dressings on the land, at a fair valuation." In a subsequent part, it was stipulated as follows :—"The purchaser shall, upon payment of the remainder of the purchase money agreeably to the third condition, receive possession of the lease and other title deeds, *but shall not be entitled to any assignment to him*, or to the production of the lessor's, or investigation of the vendor's title. Possession will be given, and outgoings cleared up to Michaelmas 1826, or immediately upon the valuations being completed, if required by the purchaser." The following memorandum, at the foot of the particular as altered, was signed by the defendant.

" *September, 1826.*

"I hereby agree to purchase the leasehold estate comprised in this particular, agreeably to the annexed conditions, (the alterations, erasures [*114] and interlineations *being first made,) and to give for the same the sum of 100*l.*

" *W. Wilberforce, jun.*"

The defendant took and retained possession of the premises until the expiration of the lease.

The defendant stated, in his answer, that after he had so purchased possession of the said premises as aforesaid, he, the defendant made repeated applications to the solicitor or agent of the said company, to assign to him the aforesaid indenture of lease, and all the estate and interest of the said company in the said term, and that they absolutely refused to do so; and that, thereupon, the defendant, in order to prevent an assignment by the trustees of the said company of the said leasehold premises, or their interest therein, requested the solicitor of the said company to procure for this defendant, a disclaimer from the said trustees of the said company, of all their estate and interest in the said premises; and that, accordingly, in or about the month of December, 1828, the aforesaid indenture of lease, with the said assignment endorsed thereon, was returned to the counting house of the defendant; and that there was also endorsed thereon some writing, purporting to be a disclaimer by the said trustees of their interest in the said premises, and that such disclaimer bore date the 6th day of December, 1828.

In September, 1835, the lease expired, and there having been considerable dilapidations and breaches of covenant committed, during the time when the defendant was in possession, the executors of Mrs. Jefferson brought an action at law against the plaintiff, to recover damages for these

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breaches of covenant, which *had been estimated at 746*l.* The plain- [*115] tiff, having no defence thereto, gave a *cognovit* to the lessor, for the sum of 450*l.*, and then filed his bill against Mr. Wilberforce, which prayed, that the defendant might indemnify the plaintiff against all breaches, non-performance and non-observance by, or on the part of the said defendant, his agents, servants, or under-tenants of the covenants contained in the said indenture of lease, and especially the said covenant to repair the said messuage and premises; and that the said defendant might execute to the plaintiff a proper bond of indemnity in that behalf, and that he might pay to the said executors of Mrs. Jefferson the said sum of 450*l.*, and their costs of the said action, and might pay to the plaintiff his costs of the said action; and that an account might be taken of all sums of money, damages, costs, charges and expenses paid, or incurred by the plaintiff, by reason, or in consequence of such breaches, non-performance, or non-observance of the aforesaid covenants, and that the defendant might pay the amount to the plaintiff.

Mr. *Pemberton* and Mr. *James Parker*, for the plaintiff:—Even at law, the assignee of a lease is liable, during the continuance of his interest, to indemnify the lessee from breaches of covenant, although the assignment is by deed poll, and although the assignee has entered into no covenant, or agreement to that effect with the lessee; *Burnett v. Lynch.*(a) This is a duty arising from the situation of the parties; the effect of an assignment is this, the lessee, who, as between himself and the lessor, is the principal, becomes by the assignment a surety to the lessor for the assignee, the assignee is therefore bound *to pay the rent and perform [*116] the covenants running with the estate; the surety, after paying the debt, or discharging the obligation to which he is liable, has his remedy over against the principal; *Wolveridge v. Steward.*(b) “The equity,” says Lord Eldon, “is clear, that he who takes an assignment of a term, shall take it giving a covenant of indemnity to the assignor, against the payment of the rent, and the performance of the covenants; and there is no distinction between the cases of assignment by the original lessee and by the assignee of the original lessee;” *Stains v. Morris.*(c)

The defendant is a mere equitable assignee, no assignment having been made to him; and the plaintiff having a right, but no legal remedy, is entitled to come into a court of equity to enforce his claim, in the same way, as when, by reason of an outstanding term, a party, who is unable to pursue his remedy at law, has a right to demand the aid of this court.

It has been established, by a series of decisions, that an equitable assignee of a lease is liable to the rent and covenants, even although he has not taken possession; *Lucas v. Comerford,*(d) *Flight v. Bentley,*(e) *Jenkins v. Port-*

(a) 5 Barn. & Cr. 589. (b) 1 Cr. & Me. 644. (c) 1 Ves. & B. 8.

(d) 1 Ves. jun. 235. S. C. 3 Bro. C. C. 166.

(e) 7 Sim, 149., since overruled by the V. C. in *Moore v. Choat*, 20th February, 1839.

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man.(a) Here the case is much stronger, for the defendant has been in possession the whole of the period since the contract.

Sir *C. Wetherell*, Mr. *Tinney* and Mr. *N. Wetherell*, for the defendant:—*No authority can be produced in support of the equity contended for by the plaintiff. No case can be found in the reports where, instead of filing a bill for specific performance during the term, the plaintiff allows it to expire, and then comes into a court of equity for an indemnity in the shape of damages. In the first place, there is no equity for a person to apply to this court for a specific performance after the term has expired; especially where that person is not a party to the contract under which he claims; in the next place, the claim sounds in damages, and although such relief was given by Lord Kenyon, in *Denton v. Stewart*,(b) yet the principle has since been overruled; *Greenaway v. Adams*,(c) *Todd v. Gee*.(d) The case of *Burnett v. Lynch* shows that, under the agreement, the remedy against the defendant would be at law, in an action of *tort* at the suit of the vendors; the plaintiff, therefore, has no right to change the jurisdiction and come into equity.

The authorities which have been cited to show that an equitable assignee, or mortgagee of a lease is liable in equity for breaches of covenant, have no application to the present case; the defendant is not an equitable assignee: by the express terms of the contract for sale, it is stipulated that the purchaser "shall not be entitled to any assignment," so that he contracts for the mere possession of the property, and not for an assignment; he became tenant from year to year, and, as such, bound to do ordinary tenant's repairs only. A party may, both at law and equity, agree for the benefit of a lease without incurring a liability to the covenants, as by an underlease, [118] in which case no equity will arise between *the sub-lessee and the landlord. During the term, the plaintiff could not have compelled the defendant to take an assignment of the lease; first, because the terms of the contract exclude it, and secondly, because the plaintiff is a stranger to the contract; the plaintiff, therefore, has no right, after the expiration of the lease, to have recourse to equity for an indemnity, which must be founded on the assumption of there being such a prior right.

Mr. *Pemberton*, in reply:—If the defendant had taken a legal assignment, there would have been no doubt of his liability in a court of law. Here he has contracted for the whole interest, and although he is not to have a legal assignment, he is to have the whole interest, and has, in fact, had the whole enjoyment of the property. This court will therefore regard him as the absolute owner of the whole interest, or as an equitable assignee; and his liability is co-extensive with that to which he would have been subject in a court of law, if his interest, instead of equitable, had been legal.

(a) 1 Keen, 435.

(b) 1 Cox, 258.

(c) 12 Ves. 395.

(d) 17 Ves. 237.

1838.—*Cloze v. Wilberforce.*

The plaintiff is a mere surety for the defendant, and, having a right as against the defendant without the means of enforcing it at law, he seeks the aid of this court, not for the purpose of assessing the damages, but, under the common equity of a surety, to be indemnified by the principal.

THE MASTER OF THE ROLLS:—It appears that the plaintiff was, in the year 1822, entitled to the property in question, which was held by him under a lease for twelve years and a half at a rent of 300*l.*; the lease contained various covenants, some usual and some special. Both the plaintiff and *defendant were members of a company called the London and [*119] Westminster Dairy Company; and it was intended, in the latter part of 1825, that this leasehold property should be used for the purposes of the company, and it was assigned to trustees for them. Their affairs did not succeed, and, in the year 1826, this farm was to be disposed of. Particulars of sale were prepared, but the property was not sold by public auction. In September, 1826, the defendant, Wilberforce, became the purchaser of this leasehold interest, and the particulars which were prepared for the sale were used for the purpose of the contract; and it was stated, that the estate was held on lease, &c. [His Lordship here stated the terms and conditions, as altered, and the contract signed by the defendant. I must say, I have no doubt that this is an agreement to purchase the leasehold premises, and to have in equity the whole leasehold interest which was legally vested in the trustees of the company. It is said, that it was an agreement for the right of the possession, or occupation only, or something different from what appears necessarily implied from the words of the contract. The premises were held under a lease; various terms were stipulated, amongst others, that there was to be no assignment, but I have no doubt that it was a contract to purchase the whole interest in this leasehold, or at least the equitable interest.

It was agreed that the defendant was not to have the legal interest, and the consequence was that there was no liability at law under the covenants. If the defendant had accepted a legal assignment, he would have undoubtedly been bound by the covenants at law, and his grantor would have been a surety only, and entitled to call for an indemnity from him, and for the performance of the covenants by him. The question is, how does the matter stand where there has been no legal *assignment, but only an [*120] equitable agreement? If I could see, that the legal remedy would be co-extensive with the right to which the plaintiff is clearly entitled in equity, I should consider that he had no right to come here; but that is not the case. The argument is, that, under the contract, the defendant was not to be the assignee of the whole legal interest; but that he was to take a less interest. If the argument were well founded, and to prevail at law, it would not prevail here, because in this court he is the equitable assignee of the

 1839.—Greening v. Greening.

whole interest, and his obligation must be co-extensive with that equitable interest.[1]

I am not sure that this 450*l.* was the amount of what he ought to pay for the breaches of covenant to this time, and I think he is entitled to a reference to the Master on that point. The defendant must pay the costs at law and in this court, up to the present time.

DECREE.—“His Lordship doth declare, that the defendant is liable to indemnify the plaintiff, against all damages incurred by reason of the breaches of covenant in the lease in the pleadings mentioned, subsequent to the date of the agreement of September, 1826, in the pleadings mentioned. And it is ordered, that it be referred to the Master of this court in rotation, to inquire and state to the court, whether the sum of 450*l.* or any other, and what smaller sum was the amount of damages properly recoverable from the defendant.”

[*121]

*GREENING v. GREENING.

1839: April 26.

A defendant, having been committed to the Fleet for not answering, was discharged with costs, in consequence of having been turned over to the Fleet, after the expiration of the time limited to the plaintiff, by the 11 G. 4, & 1 W. 4, c. 36, s. 15, rule 5, for bringing him to the bar of the court.

By the 11 G. 4, and 1 W. 4, c. 36, s. xv. rule 5, where the defendant, under process of contempt for not appearing, or not answering, is in actual custody, and shall not have been sooner brought to the bar of the court, under process of the court, to answer his contempt, the plaintiff is directed to bring the defendant by *habeas corpus* to the bar of the court, within the period therein stated; “and in case any such defendant shall not be brought to the bar of the court, within the respective times aforesaid, the sheriff, jailer or keeper, serjeant at arms or messenger, in whose custody he shall be, shall thereupon discharge him out of custody, without payment by him of the costs of contempt, which shall be payable by the party in whose behalf the process issued.”

The defendant in this case, was taken into custody for contempt for not answering, on the 22d of January, 1839: and, according to the above rule, the plaintiff ought to have brought him before the court, by *habeas corpus*, before the 18th of April, which he neglected to do. Being in the custody of the sheriff, the defendant was, however, brought up before the Master of the Rolls by the plaintiff, by *habeas corpus*, on the 20th of April, and no objection having been then raised, he was, thereupon, committed by his Lordship to the custody of the warden of the Fleet.

[1] Vide *Sanders v. Benson*, 4 Beav. 350.

1838.—Gregg v. Taylor.

Mr. *Bacon* now moved to discharge the order of the 20th of April, and that the defendant might be *discharged out of custody with [*122] costs, on the ground, that in consequence of the default of the plaintiff, in bringing him to the bar of the court before the 18th of April, the sheriff ought, according to the express terms of the act cited, to have discharged him on the 19th of April; and that, being wrongfully in custody, his committal to the Fleet on the 20th was irregular. It appeared that the defendant was ignorant of his rights on that day. An unreported case of *Kebble v. Leech*, Michaelmas term, 1833, was referred to.

Mr. *Flather*, contra :—The bill in this case was filed in January, 1837; and, up to the present hour, the defendant has set the process of the court at defiance, and has refused to answer the bill. When brought up on the 20th he admitted his contempt, and submitted to the committal; he has therefore waived his right under the act, and the old practice must prevail. At all events, he is not entitled to the costs of the present application, which has been rendered necessary, by the neglect of the defendant himself to avail himself of his rights, when brought up on a former occasion.

THE MASTER OF THE ROLLS :—The object of the statute was to impel the plaintiff to use proper diligence, and it directs that in default, the defendant, after a certain time, shall be released from custody. When the defendant was brought up before me, and turned over to the Fleet, it was on the supposition that he was properly in custody; but it turns out that he ought to have been discharged two days previously; and, therefore, that he was not then legally detained. It is said that there was negligence on his part, but that is no *reason why the plaintiff should not proceed [*123] strictly; I am clearly of opinion that the defendant ought to be discharged, and that the plaintiff who has caused the application should pay the costs.[1]

GREGG v. TAYLOR.

1838: November 6.

Where the common order for the taxation of a solicitor's bill of costs, has been obtained *ex parte*, and the solicitor applies to discharge it, on the ground, that the order ought to have been obtained on special application, the court will not enter into the merits, further than to decide on the regularity of the order; and will not, even if the facts warrant it, then make a special order for taxation: such order must be the subject of another application by the client.

On an *ex parte* application by the client, the common order for the taxation of the solicitor's bill of costs had been obtained. The solicitor now presented a petition to discharge that order, on the ground, that certain transactions had taken place in 1828 and 1829, which as he contended, amounted to a final settlement between him and his client.

[1] Vide *Haynes v. Hall*, 4 Beav. 101. *Woodward v. Conebeer*, 1 Hare, 297

 1838.—Gregg v. Taylor.

Mr. *Pemberton*, in support of the petition, contended, that the circumstances of the case were such as to render an *ex parte* application improper; the whole facts had been suppressed, and, on the simple unsupported allegation of the employment of the petitioner, without disclosing the subsequent facts, the accounts between the solicitor and client had been ordered to be opened.

He stated, that although it had been the practice when the merits warranted a special order, to make it at the time of an application being made by the solicitor to discharge the common order for irregularity, yet, that the Lord Chancellor had recently held, that the court would not make the special order on such an occasion; but, where the common order had been [*124] *obtained instead of the special order, would, at once, discharge the former with costs.

Mr. *Chandless*, contra, insisted, that no final settlement had been effected between the client and his solicitor; and further, that, even if the order had been improperly obtained *ex parte* in the first instance, still if, upon looking into the merits, the court saw that an order for taxation could be sustained, it would not now discharge it. That such had been the constant practice of the court; and that the only effect of discharging the order would be, to create costs, and render it necessary for the court to hear the merits a second time.

THE MASTER OF THE ROLLS:—In this case the question is not, if the transaction of 1829 was valid, final and conclusive, but whether it is to be opened, by a mere order of course, for the taxation of the costs. The facts stated are, that Kensit was employed as solicitor for the petitioner and sixteen other persons; that the suit was ultimately compromised, and a certain sum was to be divided among the claimants. It was paid to Kensit, who proceeded to distribute it, and at that time he stated what he claimed for costs, and he deducted the amount of the share of each. This transaction took place in 1829. Nothing was done till this order of course for the taxation of costs was obtained, and whatever the nature of the settlement might be, it is not to be got rid of by a common order of course, for the taxation of costs. The old rule, which the Lord Chancellor acted on when presiding in this court, was, that on the discussion of the regularity of such an order of course the court would go into the merits; and if there ought to be a taxation, an order would be then made. It is satisfactory to hear that this [*125] *course of proceeding is altered; and that it has now been declared by the Lord Chancellor, that he will only consider the question of merits for the purpose of a special order, on a separate application by the client.

I must act on this decision, and grant the prayer of the petition, by discharging the order for the taxation; saying nothing as to the merits, but only, that the settlement could not be got rid of by the common order for the taxation of costs.

1838 —Booth v. Booth.

This decision was followed by his Lordship in the case of *Grove v. Sampson*, Rolls, 15th November, 1838.

BOOTH v. BOOTH.

1838.—November 14.

A trustee who stands by and sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust.

A testator bequeathed to his partner and to B., his personal estate, upon trust to invest the same, for the benefit of his wife and children. Both the executors proved the will, and the surviving partner retained the testator's moneys in the trade, which were lost. B. took no active part in the trusts, but was cognizant of the breach of trust, and took no proceedings to prevent it: Held, that B. was responsible for the consequences of the breach of trust.

The interest of a *cestui que trust*, who concurs with a trustee in a breach of trust, is liable to indemnify the trustee.

A plaintiff who enters into evidence to prove facts clearly admitted by the answer, must pay the costs, though he succeed in the suit.

THOMAS BOOTH, the testator, who at his death carried on the business of a manufacturer of earthenware with his brother Joseph Booth, by his will dated the 17th of April, 1820, gave and bequeathed the residue and remainder of his personal estate and effects, of what nature or kind soever and wheresoever, and every part thereof, unto his brother Joseph Booth, and his friend Mr. O. W. Batkin, two of the defendants, to hold to them, their executors and administrators, in trust, *to put and place the same out at interest upon some good and sufficient security or securities*, and to pay [*126] such interest as received, unto his said wife, until his said youngest child should attain the age of twenty-one years; and, when and so soon as as such child attained that age, then to pay one-half part of such interest unto his said wife, for and during the term of her natural life; and also to pay one-half part of the principal money that might be then out at interest, and any interest of such part that might be then due, equally unto and between such of his children as should be then living, and to the child or children of such of them as might be then dead, share and share alike, it being his will and intention, that the child or children of such of his, the said testator's, said children as might be dead should be entitled to the parents' share; and after the decease of his wife, then in trust, to pay the other half part of such principal and interest due thereon, equally between and among such of his, the said testator's, children as should be then living, and to the child, or children of such as might be then dead, share and share alike.

The testator died in May, 1820, leaving his widow and the plaintiffs, then infants, his two only children, him surviving; and his will was, in October, 1820, proved by Joseph Booth and William Batkin.

The partnership expired by the death of the testator, but W. Batkin allowed his co-executor to carry on the business, for the benefit of himself and the

1838.—Booth v. Booth.

family of the testator, in the name of Joseph and Thomas Booth, until 1830, when Joseph Booth became embarrassed, and the testator's capital lost.

The youngest of the testator's children attained twenty-one in [*127] April, 1830. This bill was filed to obtain "an account of the testator's estate, and to make the trustees liable for the moneys lost by continuing the business.

The defendant, Batkin, by his answer, said, that he joined in the probate of the will as a matter of form only, and at the request of Joseph Booth, the defendant, and Elizabeth Booth, the widow of the said testator: and that it was fully understood that he should not be called upon further to interfere, or act in the execution of the trusts of the said will; nor did he conceive that, by merely joining with Joseph Booth in proving the said will, he should become, nor did he, as he submitted thereby, in fact, become answerable, further than for his own acts, deeds, receipts and payments, if any; and, save as aforesaid, he denied it to be true that he took upon himself the execution of the testator's will, or of the trusts thereby reposed in him.

It was not proved that the defendant Batkin took any active part in the trusts of the will; but there was evidence that he had, from time to time, frequented the manufactory, and was aware of the manner in which it had been carried on after the death of the testator.

The liability of Batkin was the point principally discussed.

Mr. *Pemberton*, Mr. *Spence* and Mr. *Bazalgette*, for the plaintiffs:—The proving the will by Batkin was an acceptance of the trusts, *Mucklow v. Fuller*.^(a) It was the duty of the trustees, upon the death of the [*128] testator, to have "realized his property, "and place out the same upon good and sufficient security." Joseph Booth, who retained the testator's property in the business, was guilty of a breach of trust, and is clearly liable for the losses which have occurred, and Batkin, who stood by and permitted that breach, is equally liable; *Brice v. Stokes*,^(b) *Hanbury v. Kirkland*,^(c) *Moyle v. Moyle*,^(d) *Byrchall v. Bradford*,^(e) *Keble v. Thompson*,^(g) *Stickney v. Sewell*,^(h) *Caffrey v. Darby*,⁽ⁱ⁾ *Tebbs v. Carpenter*,^(k) *Powell v. Evans*.^(l)

Mr. *Kindersley* and Mr. *Wilbraham*, contra, for the defendant Batkin, submitted, that he was not liable for the breaches of trust of his co-executor. That he had taken no part in the proceedings, and that what had been done, was for the benefit of the family, and with the full concurrence of the widow, whose interest, they submitted, was liable to make good any losses.

THE MASTER OF THE ROLLS:—This is a very unfortunate case. It is

(a) Jacob, 198.

(d) 2 Russel & M. 710.

(h) 1 Mylne & C. 8.

(l) Ves 838.

(b) 11 Ves. 319.

(e) 6 Maddock, 13.

(i) 6 Ves. 488.

(c) 3 Simons, 265.

(g) 3 Brown, C. C. 111.

(k) 1 Maddock, 290.

1838.—Booth v. Booth.

to be lamented that Batkin, by inadvertence and over good nature, should have placed himself in such a situation of responsibility as he has done. Here is a will, the terms of which are perfectly distinct. [His Lordship read it.] On the 25th of October, 1830, the two executors proved the will; they take on themselves the trusts and the duty of performing it.

*From that moment it was their duty to do all that was necessary [*129] for the conversion of the estate into money, and to see the dividends duly applied; but Batkin, unfortunately, did not consider that, by proving the will, he had undertaken any duty, or incurred any responsibility; he says he proved the will in consequence of the request of the widow, who informed him, that he would not thereby undertake any duty, or be responsible for any thing. It is important that it should be well understood that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which, by proving the will, he has undertaken. I am of opinion that he became liable for the performance of the trusts, and for any consequences arising from a breach of them.[1]

Part of the testator's property was engaged in trade: that trade ought to have been put an end to, and the property invested. Batkin, it appears, went to the place of business from time to time, and it is, therefore, clear that he knew, that what ought to have been done was not performed. He acquiesced, week by week, and year by year, in the breach of trust which his co-executor was committing. There is no corrupt motive—no receipt of money which he misapplied to be attributed to him, but he undertook the performance of a duty which he did not perform. This is no small blame: a man cannot be allowed to neglect a duty which he has undertaken. He permitted his co-executor to carry on the trade, and, consequently, must be considered, in this court, a party to this breach of duty. It is said, in extenuation, that he did this from the best motives; he thought the brother of the testator was the proper person to carry on the business; he thought there would be more profit made by this mode of dealing with the property, and that it was more advantageous for the *children. All this [*130] might have been very right to do and to acquiesce in, if he had undertaken to make good any loss which might occur in the course of the experiment; he could not, however, so act without incurring that responsibility, if a loss occurred.

I am of opinion, on the authorities and on the established rules of the court, to which it is not necessary to refer, that a trustee who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust.[2]

That the widow concurred seems to be quite clear; and any interest to

[1] Vide *Williams v. Nixon*, 2 Beav. 472. *Dove v. Everard*, 1 Russ. & M. 231. *Edmonds v. Crenshaw*, 14 Peters, 166. *James v. Frearson*, 1 Yo. & Coll. C. C. 370. 3 Myl. & Cr. 710, n. 1.

[2] Vide *Williams v. Nixon*, 2 Beav. 475. *Clark v. Clark*, 8 Paige, 152. *Greenwood v. Wakeford*, post, 576. 3 Myl. & Cr. 498, n. 1.

 1839.—*Davis v. Elmes.*

which she may be entitled is the proper fund to resort to in the first instance. If she has obtained any benefit from the breach of trust, the trustee, ought to be compensated in respect of it. I must, therefore, declare, that the property ought to have been realized on the death of the testator; and that Batkin and Booth are liable for any loss which has occurred from not winding up the testator's affairs at that time.

The plaintiffs had gone into evidence as to the interference of Batkin in the business, and Mr. Wilbraham submitted, that, as the plaintiffs' evidence did not carry the case further than the admissions contained in the answer, the plaintiffs were not justified in going into evidence to prove that which was admitted; and that, therefore, the defendant ought to be allowed the costs incurred by this useless evidence.

THE MASTER OF THE ROLLS thought that the defendant would be entitled to these costs if the plaintiff could have read, from the answer [131] of the defendant, a *clear admission of the same facts, which the witnesses proved.

On examining the pleadings, however, it did not appear that the answer contained such clear admissions; and no special order was made as to these costs.

DAVIS v. ELMES.

1839: February 18.

A testator bequeathed to his daughter and her husband 300*l.*, and directed if the husband should be indebted to him at the time of his death, the debt should be deducted out of his legacy. The husband died in the lifetime of the testator, indebted to him in 250*l.*, and the testator afterwards died: Held, that the debt was not to be deducted from the daughter's legacy.

THIS case came before the court upon demurrer, and by the statements in the bill it appeared that the testator, who was the plaintiff's father, after giving a life interest in his property to his widow, gave a sum of 300*l.* to Dennis Davis and Charlotte his wife, for their own use and benefit; and he gave a similar sum to James Elmes and Mary Ann his wife, to and for his and their use and benefit; and he directed, "in case any or either of them the said Henry John Elmes, Dennis Davis and James Elmes should be indebted to him at the time of his decease, such sum or sums of money as he or they might be so indebted as aforesaid to be deducted and retained out of his or their legacy, so far as the same would extend and be sufficient for that purpose."

The testator made advances to Dennis Davis.

In March, 1833, Dennis Davis died indebted to the testator in the sum of 250*l.*, which still remained unpaid.

1839.—*Davis v. Emles.*

*The testator survived Dennis Davis, and died in August, 1833; [*132] and his widow died in 1838. The question raised by the demurrer was, whether the plaintiff Charlotte, the widow of Dennis Davis, was entitled to the legacy of 300*l.*, without deducting the debt due from her husband to the testator.

Mr. *Kindersley* and Mr. *B. Spencer Follett*, for the demurrer. The husband's debt was to be deducted out of a particular fund, expressly pointed to by the testator, namely, the legacy of 300*l.* previously given; the death of Dennis Davis cannot affect the direction, or the qualification to which the legacy was subjected by the testator's will. The intention was clear; the testator intended an equality between the families of his three daughters, and made this provision for the deduction of any advances made by him in his lifetime; he intended the deduction to be made out of the interest of his daughter, as well as of his son-in-law.

Mr. *Pemberton* and Mr. *Chandless*, in support of the bill. The debt was to be deducted out of *his*, not *her*, legacy. The testator never could have intended the husband's debt to be paid out of his widow's legacy, the effect of which would be, to give the benefit of the wife's legacy to strangers to the testator, namely, to the husband's legatees, if he died solvent; and to his creditors, if he had died insolvent. The events have not happened on which the deduction was to take place; Dennis Davis was not indebted at the testator's death, but his estate, or representatives only were then debtors to the testator; and there is no particular legacy given to *him* out of which the debt can be deducted.

Mr. *Kindersley*, in reply.

*THE MASTER OF THE ROLLS:—In this case, the testator has used [*133] words which might have had a legal operation in one of three events which might have happened; first, in the event of the husband and wife surviving him; secondly, of the husband alone surviving him; and thirdly, of the wife alone surviving. The husband was the debtor of the testator, and he has directed, that if the husband, &c.—[Reads the will.]

If the husband had survived his wife and the testator, the legacy would have become his; if both survived, there would have been a distinct interest to the husband, at least; but in the event which has happened, the husband never had any interest in the legacy. The question is, if the testator is to be taken to have intended, that when the husband had no interest, his personal debt was to be deducted from the wife's interest. I cannot say that such was his intention, or that, in the events which have happened, the legacy, which vested in the wife alone, is to be applied in payment of the husband's personal debt.[1]

I cannot dispose of this case without expressing my approbation of the manner in which the question has been brought before the court. The re-

[1] Vide *Sheffield v. The Earl of Coventry*, 2 Russ. & M. 317.

1838.—M'KENNA v. Everitt.

cord has been so framed as to bring the point before the court at the least expense, and shows a proper spirit on both sides.

Demurrer overruled.

[*134]

*M'KENNA v. EVERITT.

1838: November 7.

C. E., in the lifetime of her husband, contracted a second marriage with the testator, and after his death, with J. C. The testator believing C. E. to be his wife, bequeathed to her all his property, and appointed her his executrix; she proved his will, and J. C., as her husband, possessed part of the estate of the testator; the next of kin having filed a bill against C. E. and her real husband impugning the validity of the will, and seeking an account of the testator's estate: Held, that the husband of C. E. though he had not interfered, was a necessary party, but that J. C., her supposed husband, was not.

THIS bill was filed by the next of kin of Anthony M'Dermott against Thomas Everitt and Charlotte his wife, stating in substance, that Charlotte Everitt, being the wife of the defendant Everitt, and fraudulently representing herself to be a single woman, intermarried, in the year 1826, with the testator Anthony M'Dermott. That Anthony M'Dermott, being under that impression and in the firm belief that the defendant Charlotte Everitt was his lawful wife, by his will gave all his real and personal estate "*to his dear wife Charlotte M'Dermott,*" and appointed her sole executrix of his will; that the testator died in September, 1832, and Charlotte Everitt, by the name of Charlotte M'Dermott, and as the widow and executrix of Anthony M'Dermott, proved the will. The plaintiffs by their bill submitted, that, in consequence of the fraud the bequests in the will were void; it stated that Charlotte Everitt had possessed all such parts of the testator's estate as she had been able to do; that she now passed by the name of Charlotte Calverley; and it prayed a declaration that the personal estate of the testator, under the circumstances, belong to his next of kin; and that an account might be taken of the estate and effects of the testator, which had been possessed by and had come to the hands of Charlotte Everitt, or any other person or persons by her order or for her use; and that the usual accounts might be taken, and the residue ascertained and divided between the plaintiffs.

The defendant Thomas Everitt put in a plea to this bill, stating, in effect, that from February, 1825, to the time of filing his plea, he had lived
 [*135] separate and apart from his wife Charlotte Everitt, and that during such time he had had no power or control over her; that the appointment of her, as executrix, was made without his knowledge or privity, and that the proof of the will was made without his knowledge, privity, or consent, and that he had never assented to her acting as executrix thereof, or to her administering the estate of the testator, and that he had not received any of the property of the testator. He also stated, that in February, 1834,

1838.—M'Kenna v. Everitt.

Charlotte Everitt had intermarried with Joseph Calverley, and that Joseph Calverley, as the husband of Charlotte Everitt, had sold out 116*l.* long annuities, which formed part of the estate of the testator. The plea then continued as follows :—"That the said Joseph Calverley is a necessary party to the said bill, and ought to be, but is not, made a party thereto; and, therefore, this defendant doth plead the matters aforesaid to the said bill, and humbly insists that the defendant ought not to be compelled to make any further or other answer thereto."

Mr. Tripp, in support of the plea :—Everitt, who has received no part of the assets, nor proved the will, nor assented to any intermeddling on the part of his wife, is not a necessary party. Calverley, who has received the whole assets, has become an *executor de son tort*, and in that character is a necessary party; in order that he may account for his receipts, for which he, and not Everitt, is answerable. In the case of *Glass v. Oxenham*,^(a) a father appointed an executor *durante minore ætate* of his daughter, and appointed her executrix on her coming of age: it was held, that the executor who had received assets, was a "necessary party to a bill for an account, [*136] brought after the daughter had attained twenty-one; so here the executor *de son tort* is a necessary party.

Mr. Pemberton and Mr. Purvis, contra :—It is impossible to sue Mrs. Everitt without bringing her husband before the court as her protector, and who may be answerable for her defaults. An executor *de son tort*, who is a mere debtor to the estate, is not a necessary party to a bill against an executrix, for an account of a testator's estate; and an executor *de son tort* cannot exist where, as in this case, there is a regular executor or executrix.

The plea is wrong in form, it does not confine itself to the necessary averments, but it answers the greater part of the bill.

THE MASTER OF THE ROLLS :—It appears that the wife of Everitt, pretending to be a single woman, married M'Dermott; he, supposing himself to be her husband, made his will, and by which he gave the whole of his property to "his dear wife Charlotte M'Dermott," and he made her his executrix. She possessed the property, her first husband being alive, and after the death of M'Dermott she married again with Calverley. The wife of Everitt having possessed the property of M'Dermott in the character of his executrix, allowed part of it to be transferred to Calverley. The plaintiffs are the next of kin of M'Dermott, and file this bill to establish a fraud as against Mrs. Everitt, and to have it declared, that she is not entitled to the benefit of the will, but that the next of kin of the testator are entitled. Mrs. Everitt is a necessary party; and being a necessary party, it is of course that the husband should also be made a party. He alleges, [*137] however, that Calverley is a necessary party to the suit, because he has possessed a portion of the estate; this argument, if followed up, would make

(a) 2 Atkins, 121.

 1838.—Greenlaw v. King.

it requisite to bring before the court every person who has possessed any part of the testator's estate. If the plaintiffs thought right, they might follow the assets into the hands of Calverley; that is not now the question, but it is this, whether Everitt has a right to say, that the plaintiffs *shall* follow the assets into the hands of Calverley. I think he has not, and, therefore, the plea must be overruled.

Plea overruled.

GREENLAW V. KING.

1838: December 6, 7.

The privilege of a client, as to discovery, is not co-extensive with that of his solicitor; there are cases where the solicitor would be protected from discovery, but the client would not.

A case submitted to counsel, and confidential communications had with his solicitor by a deceased owner of a charge on a living, in contemplation of proceedings being taken by the future incumbent, and which had come into the possession of the defendant, who was the assignee of the charge: Held, not privileged.

Confidential communications, which took place after the dispute had arisen, between a defendant and a solicitor, who acted as agent and adviser only, but not as solicitor: Held, not privileged.

THE bill in this case stated two acts of parliament of the 49 & 52 G. 3; by which, for the purpose of building a new rectory house at St. Mary's, Woolwich, the rector, with the consent of the bishop of Rochester, was empowered to borrow 2000*l.* by way of annuities, upon one or more life or lives, and to secure that sum upon the rents and profits of the rectory.

In 1813, the then rector, with the consent of the then bishop of Rochester, in consideration of 2000*l.* expressed to be paid by a Mr. Venables, granted a life annuity of 170*l.* to Venables.

[*138] *The 2000*l.* was the money of the bishop, and Venables, who was a mere trustee, had executed a declaration of trust to that effect; in 1823, the bishop, for natural love and affection, assigned the annuity to his son, the defendant Mr. King.

The bishop and the rector both died in 1837; and the plaintiff, the present rector, filed this bill to set aside the annuity as invalid, by reason of the trust reposed in the bishop by the act.

The defendant, Mr. King, by his answer, made the following admission as to his possession of documents relating to the matters in question in the cause.

"And this defendant saith, that he hath, in the schedules to this his answer annexed, marked respectively with the figures 1 and 2, set forth a full and true list and schedule of all the deeds, books of account, accounts, letters, copies of or extracts from letters, receipts, documents, papers or writings, or of any deed, book, book of account, letter, copy of or extract from a letter, receipt, document, paper or writing relating to the matters in the bill men-

1838.—Greenlaw v. King.

tioned, or to any of them; and from which, if produced, the truth of the several matters in the said bill stated and charged would appear, which defendant hath now or ever had in his possession, custody, or power; but defendant saith, that the several letters and copies mentioned and referred to in the second schedule to his answer annexed, and to which the figures from 1, 2, 3, 4, 5, 6, 7, 8, are set opposite, are confidential communications which passed between defendant's late father (the bishop) and William Leigh, who then was and acted as his solicitor and agent; and that such letters were written confidentially by the defendant's father, as client to the said William Leigh, and "by William Leigh, as solicitor to the defendant's [*139] father, in reference to the matters in litigation in the present suit, and in contemplation of such proceedings being taken by some successor of the then incumbent of the said rectory of Woolwich, as are now taken by the plaintiff in this suit; and that the case stated for the opinion of counsel and the opinion given thereon, to which the figure 25 is set opposite, were respectively stated and given, in reference to the matters in litigation in the present suit, and in contemplation of such proceedings being taken by some successor of the then incumbent of the rectory of Woolwich, as are now taken by the plaintiff in this suit.

"And this defendant saith, that the several other letters, and copies of letters, mentioned and included in the second schedule, and to which the figures from 9 to 24 inclusively, and from 26 to 46 inclusively, are set opposite, are and passed as confidential communications between this defendant and William Leigh, who continued to act *as the agent and adviser of this defendant, though not as his solicitor*, and between William Leigh and this defendant's counsel and solicitors, and between this defendant and his counsel, in the character of client, solicitor and counsel, in reference to the matters in litigation in this suit, and in contemplation of this suit, and after dispute had arisen between the plaintiff and the defendant with reference thereto."

"And this defendant submits that he ought not to be compelled to produce the said several letters and the said case and opinion mentioned and included in the second schedule to this his answer annexed, or either of the copies of the said case and opinion respectively, or any or either of them."

*A motion was now made, on behalf of the plaintiff, for the production of the documents mentioned in the schedule. [*140]

Mr. Pemberton, Mr. Kindersley and Mr. R. W. E. Forster, in support of the motion, contended, that the correspondence which had taken place between the bishop and his solicitor, prior to the institution of this suit, or its being in contemplation, and the case then submitted to counsel, were not privileged; and as to the communications between the defendant and William Leigh, who acted as the defendant's friend, and not as his legal adviser, the defendant was bound to produce them; they cited *Radcliffe v. Fursman*.(a)

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Mr. *Richards* and Mr. *Heberden*, contra:—As to the correspondence which passed confidentially between the late bishop and Mr. Leigh, his solicitor it is quite clear that if this motion were directed against Mr Leigh himself, it would be refused; *Wright v. Mayer*,^(a) *Greenough v. Gaskell*,^(b) *Cholmondeley v. Clinton*.^(c) The privilege being that of the client, and not of the solicitor, it must equally exist, where the solicitor has parted with the possession of his client's documents and they have come into the possession of another person. If Leigh happened to be a defendant to the bill, he would not be ordered to produce these documents, and, therefore the present defendant, who represents him, is equally privileged.^(d) The effect of their being produced might be to render the estate of the bishop liable; and surely, therefore, the court will not, in a suit to which the

[*141] *bishop's representatives are not parties, order their production.

It is admitted that the documents are in the defendant's power, that may mean, that Mr. Leigh would deliver them over, if asked; but will the court force the defendant to procure them from the solicitor of another party?

It is said that the communications are not privileged, because they took place some years before the institution of this suit; but the rule is, that when an attack is contemplated, a party is at liberty to have recourse to the advice of skilful persons, without being compelled to make a discovery of such confidential communications. *Walker v. Wildman*,^(e) *Hughes v. Biddulph*,^(g) *Vent v. Pacey*,^(h) *Bolton v. The Corporation of Liverpool*,⁽ⁱ⁾ *Storey v. Lord George Lennox*,^(k) and *Nias v. The Northern and Eastern Railway Company*.^(l) In the last case, a case for the opinion of counsel, submitted to counsel after the dispute in the cause had arisen, and before proceedings had been commenced, was held privileged; and the Lord Chancellor there observed that, "whether a bill was or was not actually filed at the time was, to his mind, a matter of perfect indifference."

With respect to the correspondence between the defendant and Mr. Leigh, they contended, they were privileged as having taken place between the defendant and his legal adviser, though not as his solicitor, and that

[*142] it might probably be for the purpose of collecting *evidence which ought not to be communicated to the opposite party, lest the witnesses should be tampered with and the evidence known before publication, which was contrary to the rules of the court; *Curling v. Perring*,^(m) *Preston v. Carr*.⁽ⁿ⁾

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS:—This is a bill, filed by the plaintiff against the defendant, to have it declared, that a security is void or satisfied.

(a) 6 Ves. 280.

(b) 1 Mylne & K. 98.

(c) 19 Ves. 268.

(d) See *Parkhurst v. Lowten*, 1 Mer. 391.

(e) 6 Mad. 47.

(g) 4 Russ. 191.

(h) 2 Russ. 193.

(i) 1 Myl. & K. 88.

(k) 1 Keen, 351; S. C. 1 Mylne & Cr 525.

(l) 2 Keen, 76. 3 Mylne & Cr. 355.

(m) 2 Mylne & K. 380.

(n) 1 Younge & J. 175.

1838.—Greenlaw v. King.

The transaction was this :—For the purpose of raising money for improving the rectory house of St. Mary's, Woolwich, an annuity, on the authority of an act of parliament, was to be granted to such person as would advance the money requisite for that purpose ; the whole transaction was to be conducted with the consent, and under the control, of the bishop of Rochester. An annuity was granted to a nominee of the bishop, who advanced the money. During the incumbency then existing, the transaction was not questioned ; but on a new incumbent being appointed, this bill was filed to impeach the transaction. A motion is now made for the production of certain papers which, by the answer, are admitted to be in the possession of the defendant.

As to some of the papers there is no dispute, viz., the documents in the first schedule, which, it is admitted, ought to be produced ; and there is no doubt that certain documents in the second schedule, viz., the correspondence of the defendant and his agent with his counsel or solicitor ought to be protected : the dispute arises on other papers. The bishop, having *procured an annuity to be granted to his nominee, in [*143] 1820 had a correspondence with his solicitor, with respect to the validity of this transaction, and a case was submitted for the opinion of counsel ; this was a considerable time before the defendant had any legal interest in the subject matter of the suit, and no dispute had then arisen, nor was any action or suit then in contemplation ; but it appears that the bishop apprehended that the transaction might be impeached, and was desirous, for his own ease and satisfaction, of knowing how far it was void ; he thought fit to communicate with his solicitor, and obtain the opinion of counsel relative thereto. In 1823, the bishop transferred the annuity to the defendant, who, from 1823, was the owner of this annuity ; and the bishop died in 1837. By means which are not explained, this correspondence between the bishop and his solicitor, and the case which was laid before counsel have come into the possession of the present defendant ; and it is in respect of these documents that one part of the question arises. I have no doubt that I must take the admission in the answer to amount to this, that he has them in his own possession or custody, or in his power in such a way, that he can, by his own will, obtain possession of and produce them. I cannot take it otherwise.

The production is resisted on the ground that the communications were confidential and ought to be protected. I am surprised at the extent of the protection from discovery which is sometimes claimed. The general rule of the court is, no doubt, that what the defendant knows relating to the matters in question, the plaintiff has a right to know also, and for this very purpose, to prevent the defendant from suppressing within his own breast the matters material to the determination of the question between the parties. A defendant may resist *a just demand, knowing, from circumstances [*144] solely within his own knowledge, such resistance on his part to be unjust ; this would be a fraud, and could only be prevented by a discovery.

1838.—Greenlaw v. King.

The defendant, on the other hand, by filing a cross bill, has a right to know all that the plaintiff knows, and may be material for his defence: this is one of the great distinctions between courts of equity and the other courts in this country: here you can appeal to the conscience of a party, and obtain information; to extend the protection from discovery, further than is absolutely necessary, would be to cripple the jurisdiction of courts of equity in the most important particular. But there are exceptions to the general rule, and one is where knowledge of the fact has been communicated between the party and his solicitor; and it has been argued, that in every case in which a solicitor is bound to conceal his knowledge, the client himself ought to be protected from making such discovery. I do not accede to that proposition. There are many cases in which it would be contrary to the duty of a solicitor to disclose facts, of which, upon a bill being filed in this court, the client would be bound to make a discovery: this shows that the two propositions are not co-extensive; the solicitor may not be bound, or not permitted, to disclose matters which come to his knowledge as a solicitor, and yet the client may be bound to disclose them. It is decided, that if the knowledge of the client be obtained through his solicitor, there may be a protection; but in this case it is apparent that the knowledge of the defendant has not come to him through his solicitor. The argument is singular: it is said the information required to be disclosed was obtained from the late bishop, by Leigh in his character of solicitor; and that it was therefore his duty not to communicate it; that it must have been from Leigh that the defendant acquired the information; and that the defendant was entitled to the same privilege as Leigh, and was not, therefore, bound to state the information, because Leigh would not have been at liberty to disclose it as against the late bishop. It is very difficult to follow this. The bishop's executors, it is true, are not here; but, for any thing that appears to the contrary, the defendant has obtained the information from the bishop himself. If Leigh performed his duty, which I must assume he did, he would not have delivered up the papers without the consent of the bishop or his executor; and as these papers do not appear to have passed between the defendant and his solicitor, and are, therefore, not within the exception, they must be produced.

I take it to be clear, that the other documents which are the subject of discussion, consisting of the correspondence which has taken place since the dispute arose, between the defendant and the solicitor to the late bishop, but who is not the solicitor to the defendant, being merely his agent and confidential friend, are not protected. If these letters had been written to Leigh, for the purpose of being communicated, by that channel, to counsel, another question might have arisen;—I might have thought it subject to a different rule; but it is not so; they are communications which have taken place between the defendant and Leigh, not in his character of solicitor; and it cannot be said, that a mere friend is a person so confidential that a communication with him is privileged: the cases of privilege are confined to solicitors

1839.—Lord Selsey v. Lord Lake.

and their clients ; and stewards, parents, medical attendants, clergymen and persons in the most closely confidential relation are bound to disclose communications made to them.[1] How can it be said that a mere friend is not equally bound ? There must be a production of the papers and correspondence which passed between the bishop and Leigh *in the life- [*146] time of the bishop ; and of those papers between the defendant and Leigh, acting as his agent, and not as his solicitor.

The production of the opinion of counsel was not required, and all the other papers, except the correspondence between the defendant and his solicitor, were ordered to be produced.[2]

LORD SELSEY v. LORD LAKE.

1839 : January 29.

A person having a partial interest in an estate bought up charges thereon, and had them transferred to trustees for him ; he afterwards became absolutely entitled to the estate : held, under the circumstances, that the charges had merged in the inheritance.

A testator gave a rent charge to trustees, during the life of A. B. and her five daughters, in trust, to pay it to A. B. for life, and after her death, upon "trust for her said daughters, and the survivors and survivor, and while more than one should be living to be divided between them in equal shares." A. B. had five sons, and one daughter only : Held, that, subject to the life interest of A. B., her only daughter was entitled to the rent charge of 200*l.* for life.

MRS. SEARE, being seised of certain freehold and copyhold estates, subject to a mortgage for 9500*l.* vested in Sir John Mordaunt and W. Hayton, by her will, dated in 1794, devised them to Henrietta Seare, for life, with remainder to John Peachey, in fee, in trust, as to one moiety, to the use of Anna Maria Barker, for life, with remainder to her first and other sons, in tail, with remainder to her daughters, with remainder to Caroline Lockman, for life, with remainder to her first and other sons, in tail, with remainder to her daughters, with an ultimate limitation to Charles John Gough, in fee. She devised the other moiety in a similar way, the limitations, however, to Caroline Lockman and her children, preceding those to Anna Maria Barker and her children.

*The testatrix died in 1798, and, in 1800, under the authorities in [*147] an enclosure act, Henrietta Seare mortgaged several pieces of land, allotted to her in respect of the estate, for the sum of 1500*l.*, which was se-

[1] Vide 3 Myl. & Cr. 359, n. 1.

[2] The Editor has nothing to subjoin relative to the *quæstio vexata*, above discussed, but a simple reference to his previous notes, 2 Sim. & Stu. 311, n. 1. 4 Russ. 191, n. 1. Id. 194, n. 1. 3 Myl. & Cr. 359, n. 1. 1 Keen, 353, n. 1, 2. Id. 355, n. 1. Id. 357, n. 1. The transaction out of which the discussion arose, was (July, 1840) set aside by Lord Langdale, M. R. : whose decree was (January, 1841) affirmed by the Lord Chancellor. See 3 Beav. 49.

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cured by a demise for a term of 1000 years to Runting, in trust for Edward Barker.

In 1802, Edward Barker, the testator in the cause, purchased the reversion in fee of C. J. Gough, expectant upon the determination of the several previous estates limited by the will of the testatrix, in the freehold and copyhold hereditaments, and which, in May, 1802, was duly conveyed to him.

In June, 1802, the mortgage for 9500*l.* was transferred by Sir J. Mordaunt and W. Hayton to Maberley and David; as to 5500*l.*, for the benefit of Maberley and David, and as to the remaining 4000*l.*, in trust for the testator Edward Barker: and, in the same month, the mortgage for 1500*l.* was transferred to Maberley and David.

In November, 1807, the estate and interest of Caroline Lockman was purchased by Edward Barker, and by conveyances of that date, the whole estate was conveyed by Caroline Lockman and Edward Barker and Anna Maria his wife, to John Peachey, in fee, in trust to secure an annuity to Caroline Lockman, and subject thereto, as to one moiety, to Anna Maria Barker, for life, with remainder to Edward Barker, in fee, "subject to the said mortgage of 5500*l.* and the interest thereof, and all other incumbrances charged, due or owing thereon;" and as to the other moiety, to the use of Edward Barker, in fee, to uses to bar dower, "but subject to the said mortgage of [148] 5500*l.*, and the interest thereof and all other incumbrances charged, due and owing thereon."

By an indenture, dated the 26th of March, 1813, after reciting that Edward Barker had, previously to the execution thereof, paid to Maberley and David the said sum of 5500*l.*, and that the said Edward Barker had required them to assign the aforesaid manor, &c., comprised in the said term of 2000 years, unto Robert Langford, in manner thereafter mentioned, it was witnessed that, in consideration of 5500*l.* so paid by the said Edward Barker to Maberley and David, they assigned the property, with the appurtenances, and the term of 2000 years, to Robert Langford, to hold the same for the remainder of the said term of 2000 years, in trust, as Edward Barker, his heirs and assigns should from time to time direct or appoint, and in default thereof, in trust, to attend the inheritance: "and subject and without prejudice to the contingent rights and interests of the issue (if any) of the said Caroline Lockman and Anna Maria Barker respectively, who should or might become entitled, under or by virtue of the said recited will of the said Mary Seare, but so that, as against such issue, the said Edward Barker, his executors, administrators and assigns, should or might, in that case, have and be entitled to a charge or lien in respect of the said sums of 5500*l.* and 4000*l.* respectively, so paid by him as thereinbefore mentioned; and also subject and without prejudice, as to one moiety of the said manor and other hereditaments, to the life interest of the said Anna Maria Barker therein; and Maberley and David covenanted to surrender part of the property, (being copyhold,) subject to the contingent rights of the issue (if any) of Caroline Lockman, and Anna Maria

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Barker "but so that, as against such *issue, the said Edward [*149] Barker should have or be entitled to a charge or lien in respect of the said sums of 5500*l.* and 4000*l.*" so paid by him.

On the 26th of March, 1813, the term of 1000 years created to secure the 1500*l.* was, in consideration of 1500*l.* to Maberley and David paid by Edward Barker, assigned to a trustee, in trust, as Edward Barker should appoint, and in default, to attend the inheritance, subject to the contingent rights and interests of the issue (if any) of the said Caroline Lockman, and Anna Maria Barker respectively, who should or might become entitled, under the will of the said Mary Seare, so that, as against such issue, the said Edward Barker, his executors, administrators and assigns might be entitled to a lien in respect of the said sum of 1500*l.*; also subject, as to one moiety of the said hereditaments, to the life interests of the said Anna Maria Barker therein.

Henrietta Seare died in 1807, and Caroline Lockman died in June, 1820, without having had any issue; and in October, 1825, Anna Maria Barker also died, without having had any issue.

In May, 1826, Edward Barker made his will, and he thereby devised his estates to trustees, in trust to settle the same, (subject to certain annuities,) so as to be attached to the dignity of Viscount Lake, to the intent that, so far as the rules of law and equity would admit, the person for the time being entitled to the dignity, might be entitled to the estates. No mention was made in the testator's will of the charges he had paid off.

The testator died in 1835.

*The question was, whether the two charges of 9500*l.* and 1500*l.* [*150] had merged in the testator's real estate, or subsisted as part of his personal estate.

Mr. *James Russell*, for the plaintiff, the surviving trustee.

Mr. *Kindersley* and Mr. *Neate*, for the devisees of the real estate, contended that the charges were merged, and relied on *Astley v. Milles*,^(a) *Tyler v. Lake*.^(b)

Mr. *Blenman*, (in the absence of Mr. *Pemberton*,) contra, for the defendants Cartwright and Wright, who represented the personal estate of the testator.

Mr. *Maclean*, for other parties.

THE MASTER OF THE ROLLS:—The question is, whether it is to be collected from the circumstances of these transactions, that Mr. Barker intended that these charges should continue to be subsisting charges against his heir and devisees, in favor of his legal personal representatives.

[His Lordship fully stated the circumstances of the case, and the several deeds, and proceeded.]

Having executed the deed of 1813, the testator would have been very much surprised, if he had been told that the charges were to be subsisting as

(a) 1 Simons, 298.

(b) 4 Sim. 359.

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against his heir: by his will he annexed the estate to the title of honor, without any intimation of intention to merge the charges; but I am of opinion, that under these circumstances, the charges are to be considered as not existing.[1]

[*151] *Another question arose in this case on the will of the testator; the first trusts on which he devised his estates were, during the life of his niece, Lady Borough, to pay her an annuity of 200*l.* a year, for her separate use, without power of anticipation, and a like annuity to Mrs. Brooks; and he proceeded in the following terms: "and to the intent, that the same trustees, their executors, administrators and assigns shall, during the life of my niece Elizabeth, wife of Colonel Sir John Harvey, *and the lives and life of her five daughters*, and the survivors and survivor of them, receive out of the rents and profits of the same estates, a like annuity of 200*l.*, and stand possessed of the same, upon the like trusts, for my said niece Elizabeth Harvey, during her life, as are herein before mentioned respecting the annuities raisable for my said nieces, Anna Maria Borough and Annabella Brooks: and after her death, upon the like trusts, for her said daughters and the survivors and survivor, and, while more than one shall be living, to be divided between them in equal shares."

It appeared, upon inquiry before the Master, that, at the date of the will, and at the death of the testator, Lady Harvey had *five sons and only one daughter*.

On this point *Harrison v. Harrison*,(a) *Garvey v. Hibbert*,(b) *Tompkins v. Tompkins*,(c) were cited.

THE MASTER OF THE ROLLS held that the daughter of Lady Harvey alone would be entitled to the annuity for life, on the death of her mother.[2]

(a) 1 Russ. & M. 72.

(b) 19 Ves. 125.

(c) 19 Ves. 126.

[1] "If the same person becomes absolutely entitled to an estate, and to a sum of money which is charged upon it, this court will deem the charge to have become merged in the estate, or to have become extinguished; unless it shall appear, that the owner of the estate, and of the charge intended otherwise. For the purpose of showing the intention, evidence direct and presumptive may be resorted to. The presumption being, that when the owner of an estate pays off a charge, he does it for the relief of the estate, a cotemporaneous transfer of the charge to a trustee must be considered as one of the grounds upon which the presumption may be rebutted; but no instance has been cited in which such a transfer has of itself been held to be decisive evidence against the presumption, and I am of opinion that it ought not to be so." Lord Langdale, M. R., *Hood v. Phillips*, 3 Beav. 517, 518. Et vide *The Earl of Clarendon v. Barham*, 1 Yo. & Coll. C. C. 688, 702.

[2] The legatee must accurately answer the description in the bequest; and in this instance, there was but *one daughter* to comply with the requisition. Vide, *Marsh v. Hagus*, 1 Edw. Ch. Rep. 186.

 1838.—Pyke v. Northwood.

*PYKE v. NORTHWOOD.

[*152]

1838: November 2, 3.

A yearly tenant, having the option of purchasing the property, filed his bill against the landlord, for a specific performance of the contract for sale; the landlord having proceeded to eject the plaintiff, the latter applied for an injunction to restrain him: but the court declined granting it, except on the terms of the plaintiff undertaking to continue to pay the rent, without prejudice.

THE defendant in this case entered into an agreement with the plaintiff for letting to him a house and premises for two years, with an option of purchasing it within that period. The plaintiff entered into possession, and some time after the two years had expired, he filed a bill for a specific performance of the agreement for purchasing. The defendant insisted, that the plaintiff had not availed himself of the option within the time limited, and that the contract had been abandoned, and he gave the plaintiff notice to quit, and commenced an action of ejectment against him to recover possession of the premises.

Mr. Pemberton and Mr. Bilton now moved for an injunction to restrain the defendant from proceeding in the action of ejectment, and from commencing any other action at law.

Mr. Chandless, contra.

THE MASTER OF THE ROLLS considered, from the subsequent conduct of the parties, that a contract for purchase still existed; but he said, that he would not grant the injunction, except on the terms of the plaintiff undertaking to continue to pay the rent without prejudice to any question in the cause.

It was subsequently agreed that, in lieu of the undertaking, the plaintiff should pay the purchase money into court.

*RICHARDSON v. THE BANK OF ENGLAND.

[*153]

1838: November 2.

On an application being made to the court below to stay the execution of an order pending an appeal, the party applying pays the costs; but where, before the motion to stay proceedings has been decided, the court above reversed the order below: Held, that the costs of the motion ought to be costs in the cause.

In this case, upon the motion of the plaintiffs, an order was made, at the Rolls, that the defendant, Mr. Thomas, should pay into court the sum of 21,561*l.*; the defendant appealed from the order, and gave notice of motion of an application to this court, to suspend the order for payment until the appeal had been decided: the motion stood over, and came on after the Lord

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Chancellor had reversed the order for payment, and the question now raised was, who should pay the costs of the motion.

It was said, that where a party applied, out of the common course, for an indulgence, it was only granted him on payment of the costs.

Mr. *Tinney*, for the plaintiffs, Mr. *Pemberton*, contra.

THE MASTER OF THE ROLLS:—In ordinary cases, the party applying to stay the execution of an order pays the costs of the application, on the assumption of the correctness of the order appealed from; but here, the order having been reversed before the motion was heard, no such presumption exists, and the costs ought, therefore, to be costs in the cause.

[*154]

*SCOTT v. THE EARL OF SCARBOROUGH.

1838: November 12, 13; December 20.

A testator gave real and personal estate to trustees, to accumulate the rents, &c., for twenty years after his decease; and, after certain payments, to stand possessed of the accumulated fund, in trust for all and every the child and children of his children, A., B. and C., "now born or who shall hereafter be born, during the lifetime of their respective parents," as should attain twenty-one or marry with consent, and whether born or unborn when any other of them attain the age or time aforesaid, and their respective executors, administrators and assigns."

At the expiration of the twenty years there were several children of B. who had attained twenty-one; but A. and B. were still living: Held, that the grand-children had vested interests in the fund, subject to be divested or diminished in the event of there being other children of A. or B. who should attain twenty-one or marry.

Held also, that, in the meantime, the grand-children who had attained vested interests were entitled to the income of the accumulated fund.

A testator being entitled to a sum of 15,000*l.* raisable out of an estate, bequeathed the same to trustees, on trust, during twenty years, to invest the interest and accumulate the same by way of compound interest; and, subject to certain payments, he gave "the 15,000*l.* and the interest and accumulations of the same," for the benefit of the children of A. B., and, after the end of twenty years, he directed "the principal of the said sum of 15,000*l.*" to merge in the estate. In other parts of the will the testator had referred to the fund given to the children of A. B., as "the interest of the said sum of 15,000*l.*," and as "the sum of 15,000*l.*": Held, that, the children of A. B. were entitled to the accumulated interest only, and not to the capital sum of 15,000*l.*

THE question in this cause arose upon the construction of the will of Sir George Chad.

He was entitled to certain estates called the Thursford and Pinckney estates, which were limited to the use of himself, for life, with remainder to the use of his eldest son, for life, with remainder to the use of the issue male of his eldest son, with other remainders over, the ultimate limitation being to his own right heirs. The Pinckney estate was subject to a term of 600 years, for securing a sum of 15,645*l.*, charged thereon for the benefit of the testator himself; and was also subject to some limitations, preceding the last, to which the Thursford estate was not subject.

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The testator was also entitled to certain real estates, situate at Thursford and elsewhere, which were not settled.

The testator at the date of his will and at the time of his death [*155] had four children—the defendants Sir Charles Chad, George William Chad and Mrs. Thomlinson, and Cecilia Rachel Chad, (now deceased.)

Sir Charles Chad was married and had one child only, the defendant, Edward Henry Chad.

Mrs. Thomlinson (who had married in the year 1803) had seven children, all of them daughters.

The testator, by his will, made provision for his grand-children (the younger children of his children) born and to be born, by means of the rents of a portion of his unsettled estates and the charge of 15,645*l.* on the Pinckney estate, in a way which occasioned the questions arising in this cause.

The will was dated the fifth day of June, 1814, and thereby, after reciting the limitations of the settled estates and the charge on the Pinckney estate, part thereof, of the sum of 15,645*l.*, and after disposing of the ultimate remainder of the settled estates, which was vested in his own right heirs, he devised certain parts of his unsettled estates to his trustees and their heirs, to the use of them, their executors, administrators and assigns, for the term of 300 years, on trust that the trustees should, by sale or mortgage of the estates or any part thereof, or by, with and out of the yearly rents and profits of the same in the meantime, levy such sums as his personal estate, not specifically disposed of, should be insufficient to pay off his funeral expenses, debts and legacies, and should apply the money so to be levied in the discharge of the said funeral expenses, debts and legacies; and, subject thereto, should receive all the rents, issues and profits which, during the term of twenty *years next after his death, should become due, and invest the same [*156] in their names in the public funds, or on real securities; and invest the same in such manner that all the rents, funds and securities, and the resulting income thereof might, during the whole term of twenty years, accumulate in the nature of compound interest: and should stand possessed of such rents, funds and securities, on trust, in the first place, to discharge the moneys which, under the trusts aforesaid, should have been raised for payment of his funeral expenses, debts and legacies, to the intent that the estates might be wholly exonerated therefrom. And, in the next place, on trust, that the trustees should, out of the said rents, funds, securities and accumulations, levy 6000*l.*, and invest the same in the public funds or real securities, and stand possessed thereof, in trust for all the children of Charles Chad who should be born in his lifetime or in due time after his decease, who, being sons, (but not an eldest or only son for the time being) should attain the age of twenty-one years, or, being daughters, should attain that age or marry, in equal shares. But if there should be no such child, the trustees were, out of the accumulated fund, to raise and cause to be paid to Charles Chad the sum of 2000*l.* for his own use and benefit. And, after raising the sum of 6000*l.*

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or 2000*l.*, as the event might be, the trustees were to stand possessed of so much of the *accumulated fund* as should remain, "in trust for all and every the children and child of the said George William Chad, Frances Mary Thomlinson and Cecilia Rachel Chad, *now born, or who shall hereafter be born during the lifetime of their respective parents*, or as to the said George William Chad, in due time after his decease, and who, being a son or sons, but not being an eldest or only son for the time being, of either of my said sons, or of the said Frances Mary Thomlinson, shall attain the age of [*157] twenty-one years, or who, being *a daughter or daughters*, shall attain the age of twenty-one years, or marry with consent; and *whether born or unborn when any other of them attain the age or time aforesaid*, and their respective executors, administrators or assigns, to be divided between or among "the said children, if more than one, in equal shares, by the head and not by the stock; and if there shall be but one such child, the whole to be in trust for that one, his or her executors, administrators and assigns." And if there should be no such child, he directed the trustees to convert the accumulated fund into money, and invest the money to arise from it, in the purchase of real estates, to be conveyed to the same uses and upon the same trusts as his settled Thursford estates were subject. And his will was, that, notwithstanding the protraction of the accumulation before directed to be made, the share or respective shares of each of his said grand-sons who should attain the age of twenty-one years, and the share or respective shares of each of his grand-daughters who should attain that age, or marry with consent, of or in the said ultimate surplus or residue, and who would then have been entitled to the same, if the said period of twenty years had expired by effluxion of time, should be an interest vested, or interests vested in them respectively, and be paid, transferred and assigned to them and to their respective executors and administrators accordingly.

And there was a proviso, that the term of 300 years should cease when the trusts thereof were performed: and after the determination of the term, the estates therein comprised were devised to the same uses as the Thursford estate.

And then, after devising certain advowsons, and giving the manor [*158] of Bagthorpe and other estates to his son George William, with remainder to his issue, and various remainders over, and giving power of selling, leasing and exchanging his devised estates, making provision for his daughter Cecilia Rachel and giving several legacies, he bequeathed to his trustees the sum of 15,645*l.*, secured to him on the Pinckney estate under the trusts of the term of 600 years, upon trust to apply the same, or a competent part thereof, on or towards the making good the deficiency (if any) of his personal estate, in the discharge of his funeral expenses, debts and legacies; and subject thereto, upon trust, that the trustees should, during the term of twenty years next after his death, receive the interest and annual produce of the said sum of 15,645*l.*, and invest such interest and annual produce in

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the public funds, or on real securities, and repeat such receipts and investments, so that the said residue and the interest thereof and the resulting income and produce of the same might, during the said term of twenty years, accumulate in the nature of compound interest.

And at the end of the said period of twenty years, he directed, that the trustees should stand possessed and interested in *the interest of the said sum of 15,645l.*, or so much thereof as should remain after answering such trusts and purposes aforesaid, and the stocks and accumulations of the same, on trust to pay and make good to his son, Charles Chad, the sum of 6000l., or 2000l., which, as the event might be, might be raisable from the accumulations before directed to be made under the trusts of the term of 300 years. And he directed that the trusts declared of the term of 300 years, and the accumulations to be made under the same, and the trusts declared *of the sum of 15,645l.*, and the interest and accumulations to be made of the same, should constitute one aggregate fund, for the payment of the aforesaid *sums of money, and be resorted to co-ordinately, and without any [*159] priority or posteriority between them, for the answering the purposes aforesaid; and that, subject thereto, the said *15,645l. and the interest thereof and the accumulations of the same*, or so much thereof as should remain after answering the trusts and purposes aforesaid, should be in trust for all and every the children and child of his son George William Chad and his daughters Frances Mary Thomlinson and Cecilia Rachel Chad, now born or who should thereafter be born in the lifetime of their respective parents, and who, being a son or sons, but not being an eldest or only son for the time being, of either of his said sons, or of the said Frances Mary Thomlinson, should attain the age of twenty-one years, or who, being a daughter or daughters, should attain that age or marry with such consent as aforesaid, and whether born or unborn when any other of them attained the age or time aforesaid, and their respective executors, administrators and assigns, to be divided between or among such daughters (if more than one) in equal shares, by the head, and not by the stock: and if there shall be but one such child, the whole of the same to be in trust for that one child, his or her executors, administrators or assigns. And then he proceeded, and if there should be no such child, in trust for the person or persons who, at the end of the period of twenty years, would, if he had died intestate, have been his next of kin under the statute of distribution.

And his will was, that, notwithstanding the protraction therein before directed to be made, the share or respective shares in such interest and accumulations of each of his grand-sons who should attain the age of twenty-one years, and the shares or respective shares in such interest and accumulations of each of his grand-daughters who should attain that age, or marry with consent, and *who would then have been entitled to the same, [*160] if the said period of twenty years had expired by effluxion of time,

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should be an interest vested, or interests vested in them respectively, and be transmissible to their respective personal representatives.

And he proceeded, "my will further is, that, at the end of the said period of twenty years, *the principal of the said sum of 15,645*l.**, or so much of the same as shall then be a subsisting charge on the said estates comprised in the said term of 600 years, shall sink into and be consolidated with the freehold and inheritance of the said estates, and the then residue of the said term of 600 years shall be so assigned and disposed of, as to merge in the inheritance of the same."

It should be observed that, in the former part of the will, the testator, in disposing of his settled estates, subject to the uses before the limitation to his own right heirs, made one disposition of the Thursford estate and the other parts of the settled estates which were not subject to the charge of 15,645*l.*, and another disposition of the Pinckney estate which was subject to the charge; and that he devised the Pinckney estate to the trustees, for the term of 2000 years; and, after reciting that he had laid out thereon a sum of 2600*l.* and another sum of 1255*l.*, he declared the trusts of the term of 2000 years to be, that the trustees (after failure of issue of his body entitled to the estates under the limitations in the settlement of his will in favor of his sons and their issue male and female) should, by sale or mortgage of the same estates, raise the sum of 15,645*l.*, then a charge thereon under the trusts of the term of 600 years, and also the said sums of 2600*l.* and 1255*l.* amounting together

to the sum of 19,500*l.*, which was to be invested in land, to be settled [*161] to the same uses as *the Thursford estate*: and, after the trusts declared of the charge of 15,645*l.*, the will contained a proviso, that nothing therein expressed or contained should in any wise revoke, alter or vary the trusts for raising the sum of 15,645*l.* under the trusts of the term of 2000 years.

By a codicil, dated the 6th of June, 1814, (being the day after the date of his will,) the testator, after reciting that, under the trusts of his will, the trusts of the term of 300 years, and the 15,645*l.* were to come in aid of his personal estate not specifically bequeathed for the payment of his debts and legacies, directed his executors to apply his personal estate, not specifically bequeathed, towards payment of his funeral expenses, debts and legacies; and confirmed the trusts declared in his will of the term of 300 years and of the 15,645*l.*, but declared, that among the legacies so provided for, he did not include certain annuities, or two legacies of 1000*l.* each, given to his daughters, or the sum of 19,500*l.*, directed to be raised out of part of his estates in the event therein referred to, and that his personal estate was to be wholly exempted therefrom.

The testator died on the 24th of November, 1815, and, consequently, the term of twenty years from his death expired in November, 1835. Before the expiration of the term, and in the month of June, 1828, the daughter Cecilia Rachel Chad died without having been married; the eldest son and

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heir, Sir Charles Chad, had had no child, except his son, the defendant Edward Henry Chad; the youngest son, George William Chad, had not married; one of the daughters of Mrs. Thomlinson died, at the age of about five years, in the year 1818; and a son, who was born in the year 1816, died soon after his birth: so that the only grand-children of the testator, *living at the expiration of the term of twenty years, were the son [*162] of Sir Charles Chad and the six daughters of Mrs. Thomlinson, who had all of them attained the age of twenty-one years.

The personal estate not specifically bequeathed being insufficient for payment of the testator's funeral and testamentary expenses and his debts and legacies other than those excepted, by the sum of 3496*l.* 0*s.* 6*d.*, that sum was raised or made up, to the whole amount thereof, out of the rents of the estates comprised in the term of 300 years, and the interest of the charge or sum of 15,645*l.* and the accumulations thereof; and the remainder of such rents and interest were invested and accumulated under the trusts of the will.

The bill was filed by the six daughters of Mrs. Thomlinson; and the accounts and inquiries directed by the decree in July, 1837, having been completed, the cause came before the court on further directions, the material point in the cause being, whether the trust fund, directed by the testator's will to be accumulated during the term of twenty years next after his decease, became divisible on the expiration of that term amongst the parties then presumptively entitled, (who were the plaintiffs,) the six daughters of the testator's daughter Mrs. Thomlinson; or, whether the period of the distribution of the fund was to be postponed until after the death of all the testator's children, Sir Charles Chad, George William Chad and Mrs. Thomlinson; and if so, in what manner the interest of the accumulated fund was to be disposed of, in the interval between the expiration of twenty years and the deaths of the testator's children.

Mr. *Pemberton* and Mr. *Willcock*, for the plaintiffs.

*Mr. *Tinney* and Mr. *Roupell*, for Mary Scott and Mary Frances [*163] Cattle, defendants in the same interest as the plaintiffs.

Mr. *G. Richards*, and Mr. *Sidebottom*, for trustees.

Mr. *Temple* and Mr. *James Campbell*, for Sir Charles Chad.

Mr. *Puller*, for the testator's next of kin.

In this state of things it was contended by the plaintiffs, that, according to the true construction of the will, the sum of 15,645*l.* formed part of the sum to be divided amongst the grand-children, and ought to be raised for that purpose; or, if not the whole, at least that the sum of 3496*l.* 0*s.* 6*d.* ought to be so raised to recoup to the trust fund the amount which had been taken from it to supply the deficiency of the personal estate not specifically bequeathed. It was further contended for the plaintiffs, that the fund became divisible at the end of twenty years from the death of the testator, and therefore, that 200*l.* ought now to be paid to Sir Charles Chad, and that the

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remainder ought now to be divided equally among the six daughters of Mrs. Thomlinson; or, if the fund was not actually divisible at the end of twenty years, yet that, at all events, the shares of all the objects then living, and who had attained twenty-one years of age, became vested interests; and that, although the interests might become partially divested by the coming into *esse* of other objects, the income was, in the meantime, divisible among the objects now existing.

On the other hand it was contended, on the behalf of Sir Charles [*164] Chad, that neither the sum of 15,645*l.*, nor *the sum of 3495*l.* 0*s.*

6*d.* as part of it, was subject to the trust; that the term of 300 years and the sum of 15,645*l.* were indeed made subject to the deficiency of the personal estate not specifically bequeathed, but that, if they had been resorted to for that purpose, they ought to have been exonerated by rent and interest subsequently received; and consequently, that payment out of the rent and interest was proper, and the whole of the sum of 15,645*l.* ought now to sink into the estate. And it was contended for Sir Charles Chad and Mr. George William Chad, that the trust fund was meant for the benefit of all their younger children to be born in the lifetime of their parents, or in due time afterwards; and consequently, that persons entitled to shares of the trust fund might yet be born; and they insisted, that the whole fund ought to be reserved, and in particular Sir Charles Chad insisted, that 6000*l.* ought to be reserved for such younger children as he might himself have.

Ayton v. Ayton,(a) *Mills v. Norris*,(b) *Paul v. Compton*,(c) *Whitbread v. Lord St. John*,(d) *Gilbert v. Boorman*,(e) *Defflis v. Goldschmidt*,(g) *Mogg v. Mogg*,(h) *Sprackling v. Ranier*,(i) *Storrs v. Benbow*,(k) *Prescott v. Long*,(l) *Shepherd v. Ingram*,(m) *Dyer v. Dyer*,(n) *Gilmore v. Severn*,(o) *Balm v. Balm*,(p) *Kevern v. Williams*,(q) were cited.

[*165] *December 20.—THE MASTER OF THE ROLLS:—The clauses of the will are so expressed as to make it very difficult, if not impossible, to reduce them to a clear and consistent meaning; but some parts are clear, and, on a consideration of the whole, it appears to me that the intention of the testator and the true effect of the will may be discovered.

The testator intended, that, at the end of twenty years from his death, the term of 300 years should cease; and that the 15,645*l.*, or the residue of it should sink into the estate on which it was charged, for the benefit of the persons entitled thereto; and that in one event, (which has not happened,) the whole of the 15,645*l.*, though no part of it might be wanted for debts or legacies, should be raised out of the Pinckney estate, and laid out on the trusts of the Thursford estate.

Subject to debts and legacies, the rents of the estates and the interest of the

(a) 1 Cox, 327.

(b) 5 Ves. 338.

(c) 8 Ves. 375.

(d) 10 Ves. 152.

(e) 11 Ves. 233.

(g) 1 Mer. 417.

(h) 1 Mer. 654.

(f) 1 Dick. 344.

(k) 2 Myl & K. 46.

(l) 2 Ves jun 690.

(m) Ambler, 449.

(n) 1 Mer. 414.

(o) 1 Bro. C. C. 581.

(p) 3 Sim 493.

(q) 5 Sim. 171.

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15,645*l.* were to accumulate for certain objects; if there were no objects to take, the accumulations of the rents were to be laid out in land, to be settled on the trusts of the settled Thursford estates: the accumulations of the interest were to go to the testator's next of kin.

The trusts, both as to the estates comprised in the term and the rents thereof, and as to the charge of 15,645*l.* and the interest thereof, were, in the first place, to supply any deficiency of the personal estate not specifically bequeathed.

If such deficiency were supplied out of the 300 years' term, there is an express direction, that the rents should *be applied in exoneration of the estate; there is no express direction in the event of the deficiency of the personal estate, not specifically bequeathed, being supplied out of the charge of 15,645*l.*; but there is a direction, that the trusts of the term of 300 years, and the accumulations to be made under the same, and the trusts declared of the 15,645*l.* and the interest and accumulations to be made under the same, are to constitute one aggregate sum for the payment of "the aforesaid sums of money," "and be resorted to co-ordinately and without any priority or posteriority between them, for answering the purposes aforesaid;" and I am of opinion, that the sums of money here referred to are the sums of money which might be required for payment of funeral expenses, debts and legacies, as well as the sum of 6000*l.* or 2000*l.* mentioned in the same clause.

The testator has directed that, at the end of the period of twenty years, the trustees shall stand possessed of the interest of the 15,645*l.*, after answering the purposes before mentioned, on the trusts therein stated, and has afterwards declared that, at the end of the period of twenty years, the sum of 15,645*l.* or so much thereof as shall not then be a subsisting charge, shall sink into the estate; if this were all, I think there would be no difficulty; but, in an intermediate passage, the testator has directed that, subject to the former payments directed, (*viz.* the deficiency of the personal estate and the 6000*l.* or 2000*l.* mentioned,) the 15,645*l.* and the interest thereof should be in trust for the grand-children for whose benefit the accumulations were directed. This, if taken literally, is inconsistent with the subsequent direction that the 15,645*l.*, or part of it, shall sink into the estate, and appears to me to be also inconsistent with the preceding clause directing *the trustees [*167] to stand possessed of the interest only, and with the general scope and intention of this part of the will; and, upon the effect of the whole clause taken together, though I think all the words cannot be reconciled, it appears to me that the intention was, that the principal or capital sum of 15,645*l.* should not be subject to the trusts for the grand-children, or ultimately subject to supply the deficiency of the personal estate, in the events, which happened, of the rents and interest being more than sufficient for the purpose; and I therefore think, that the trust fund consists of the rents and interest and the accumulations thereof, after deducting the amount applied in making

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good the deficiency of the general personal estate for the payment of the funeral expenses, debts and legacies.

The next-question relates to the vesting and distribution of the trust fund.

The difficulty arises from this, that the will is so expressed, as to include among the objects, children born during the lives of their parents, and yet to direct distribution at the end of twenty years from the testator's death, when the parents of the objects were living and might have more children.

Sir Charles Chad and Mr. G. W. Chad may still have younger children answering the description of the objects. If a distribution be made amongst the persons answering the description at the end of twenty years, those who may hereafter come into existence will be deprived of the benefit which was apparently intended for them; and if the distribution be delayed till it is ascertained that no other person answering the description can come into existence, those living at the end of twenty years are deprived of the

[*168] benefit intended *for them, if the testator really intended the fund to be then divided whatever might be the state of the family.

The testator has expressed himself in terms which show that he contemplated a division of the fund at the end of twenty years from his death; and if he had described the objects to be his grand-children, (younger children of his children,) or all such grand-children born and to be born, as many as there may be, it would, I think, have followed from the cases which were cited, that the fund would have vested in and have become divisible among the grand-children answering the description, who were living at the end of the term of twenty years; the generality of the expression "all my grand-children" or "all my grand-children born and to be born" being by construction, and, as it is said, for convenience, limited to the time of distribution, and the words applying to after born children, being satisfied by giving the benefit of the bequest to those born after the testator's death, and before the period of distribution. But here, the gift is to all the grand-children answering the description, who are "now born or who shall hereafter be born *during the lifetime of their respective parents*"; and the grand-children who may be born after the end of twenty years cannot be excluded without striking these words out of the will. When a testator directs a distribution amongst all of certain classes of children, or grand-children, at a future time, he may well be conceived to mean all such of the several classes as may be then living; but when he says, expressly, that he means all such of the classes as may be born in the lifetime of their respective parents, he excludes the other construction; and I think, therefore, according to the true construction of the will, the testator cannot be held to have meant, that

[*169] the fund should be *divided at the end of the twenty years, whatever might be the state of his family, or to exclude children of his children born after the end of twenty years from the benefit of the accumulated fund. It is clear, however, that he intended the interests to vest at twenty-one years of age; and I am of opinion, that the children of Mrs.

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Thomlinson, who were living at the end of the twenty years, took vested interests in their shares; but that, for the purpose of admitting after-born objects, they must hold those vested interests subject to partial divestment and diminution, in the event of other objects coming into existence: and as to the 2000*l.* given to Sir Charles Chad, in the event of his having no younger child living to attain twenty-one, I think that the same is now vested in him, subject to be divested on his having such child.

This construction does not indeed reconcile all the words of the will, but it appears to me, to be in conformity with the general intention of the testator, and to be, on the whole, the true effect of the will, and it is, therefore, to be declared as follows:—

Declare, that, according to the true intent of the will, a competent part of the rents of the estate comprised in the term of 300 years, and of the interest of the charge or sum of 15,645*l.* in the will mentioned, and of the accumulations of such rents and interest, was properly applicable to, and applied in the payment of so much of the testator's funeral expenses and debts, and of his legacies (other than such as are excepted in the first codicil) as the testator's personal estate not specifically bequeathed was insufficient to satisfy.

Declare, that, according to the true intent of the will, and in the events which happened, the trust fund *accumulated and existing at [*170] the end of twenty years after the testator's death became and was vested as to 2000*l.* part thereof, in the defendant Sir Charles Chad; and as to the residue thereof, in the six surviving daughters of the defendant Frances Mary Thomlinson, subject nevertheless, as to the said sum of 2000*l.*, to be divested, in the event of the said Sir Charles Chad having any child who, being a son (but not an eldest or only son) shall live to attain the age of twenty-one years, or being a daughter, shall live to attain that age or marry with consent; and subject, as to the shares of the said six daughters of the said Frances Mary Thomlinson, to be partially divested and diminished, in the event of there being any child of the said Sir Charles Chad and George William Chad, or any other child of the said Frances Mary Thomlinson who, being a son (but not being an eldest or only son) shall attain the age of twenty-one years, or who being a daughter, shall attain that age or marry with consent.

Declare, that, in the meantime and until such divestment or partial divestment as aforesaid shall take place in the events aforesaid, the interest of the said sum of 2000*l.*, part of the said trust fund, is payable to the said Sir Charles Chad, and the interest of the residue of the said trust fund is payable, in equal shares, to the said six daughters of the said Frances Mary Thomlinson, or to the persons entitled to receive the same in their right, respectively;[1]

[1] As to vested interest subject to divestment, see further *Nodine v. Greenfield*, 7 Paige, 544. *McDonald v. Bryce*, 2 Keen, 284. *Ellis v. Maxwell*, 3 Beav. 587.

1838.—Edgecumbe v Carpenter.

[*171]

*EDGECUMBE v. CARPENTER.

1838: November 7. 1839: April 17.

Pending a suit for the establishment of a will of real estate, the heir at law, who had concurred in the will and in the establishment of the suit, having commenced actions of ejectment and *detinue* to recover the estate and the title deeds, the court, on the application of the trustee, referred it to the master, to inquire what proceedings ought to be taken to defend the actions, and restrained the actions in the meantime.

Under special circumstances, an injunction was granted, on the application of a defendant, against a co-defendant.

A trustee, acting *bona fide* and with the concurrence of the heir at law, under a will which was supposed to be valid as to real estate, but which afterwards turns out to be invalid, is entitled to be indemnified out of the personal estate.

THE testator, by his will (alleged to be duly executed to pass real estate,) gave his real and personal estate to Richard Carpenter and M. Bloom, in trust, to pay three-fourths to his son Edward Bevan, for life, and one-fourth to Mary Edgecumbe, for life, with remainders over. The testator died in 1824, and this bill was filed in August, 1837, by Miss Edgecumbe and other persons, some of whom were married women and infants, claiming an interest in the real and personal estate, under the will of the testator, against Edward Bevan the heir at law, Richard Carpenter, the other trustee under the will, and other persons. The object of the bill was to establish the will of the testator, and for taking the usual accounts of his estate, and to remove Mr. Carpenter from being a trustee. The suit, as it appeared, had been commenced with the privity and concurrence and at the instigation of the heir at law, who, since 1824, had acquiesced in the will, and had also concurred with the trustee in the management of the real estates, in granting leases, cutting timber and making repairs.

In January, 1828, however, the heir at law having discovered that the will of the testator was invalid so as to pass real estate, commenced an action of ejectment against some of the tenants of the estate, to recover possession.

The action was defended by the trustee, Carpenter, and a verdict [*172] was found in favor of the *heir at law, and against the validity of the will, as far as it affected the real estate.

The heir at law then commenced other actions of ejectment against the other tenants; and also an action of *detinue* against the trustee, to recover the title deeds of the estate.

Mr. Carpenter, the trustee, thereupon presented a petition to the court, praying, that directions might be given him as to what proceedings he, as trustee, ought to take with respect to these matters, and for an injunction to restrain the heir at law, from proceeding in the mean time, in his actions.

The gentleman who acted as attorney for the heir at law in the actions, acted also as the solicitor of the plaintiffs, and of the heir, in this suit.

Mr. Pemberton and Mr. Simons, in support of the petition.

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Mr. *Kindersley*, for the heir at law, opposed the granting the prayer of the petition.

Mr. *Hull*, for the plaintiffs, concurred with the heir at law in resisting the reference and the injunction.

THE MASTER OF THE ROLLS, after observing on the course which had been taken by the plaintiffs, in resisting the application of the trustee, said,

This is a most extraordinary proceeding, and I cannot understand on what principle the plaintiffs have acted.

A bill is filed for the purpose of establishing a certain will; one of the defendants is heir at law: he, not long *after the bill is filed, [*173] brings an action of ejectment to recover possession of the devised estate, and employs for his attorney the same person who acts as the solicitor of the plaintiffs in the suit to establish the will; and while these proceedings are going on, the defendant, who is the trustee, applies to the court to know what he is to do, whether he is to defend the action or not; the testator having died in 1824, the will remaining undisturbed by the heir until the commencement of the proceedings at law. It is perfectly clear, that the trustee is entitled to the protection and direction of the court, and I have, therefore, no hesitation in referring it to the Master, to inquire, whether any and what proceedings ought to be taken by the trustee, either for resisting the actions of ejectment, or whether he should take any and what proceedings for the purpose of establishing the will.

The question which remains is, whether I shall stay the action of ejectment in the meantime; and the only difficulty I feel is, that this application is made by one defendant against a co-defendant.[1] This case has this specialty in it, the plaintiffs are prosecuting this suit by the solicitor, who is the attorney of the defendant who is proceeding in the action at law; and looking at the interests of the infant plaintiffs, I am of opinion, that they cannot, under these circumstances, be properly protected. How can this gentleman bring an action at law to recover the same estate which, at the same time, in a suit in equity, it is his duty to protect? And seeing that their interests cannot be duly protected by the solicitor, and it appearing that the suit is under the control of Bevan, and not of the plaintiffs, I think I may order that he should be restrained from proceeding until further order; and I think that the order should be prefaced with a declaration, "That it appears to the court *that the actions in the petitions mentioned, and [*174] this suit, are both prosecuted by the defendant, Edward Bevan."

The Master reported, that no proceedings ought to be taken to defend the action, or establish the will.

Edward Bevan, the heir, presented a petition to confirm the report and

[1] *Vide Wedderburn v. Wedderburn*, 2 Beav. 208. S. C. 4 Myl. & Cr. 585. *Kingham v. Maisey*, 3 Sim. 41.

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dissolve the injunction ; and Carpenter presented a cross petition, praying that Bevan might release him from all actions, &c., for acts done by him in the execution of the trusts of the will, and to indemnify him against all actions, &c., which might be brought by the lessees against him, under the covenants in the leases.

He founded this application on the ground, that Mr. Edward Bevan had concurred in the will, and also in the acts of the trustee, and had received a great part of the personal estate of the testator, under the will, out of which, the trustee insisted he ought to be indemnified.

Mr. *Pemberton* and Mr. *Simons*, in support of the petition of Carpenter.

Mr. *Kindersley*, contra.

THE MASTER OF THE ROLLS :—A trustee acting *bona fide* under the will has a right to be indemnified out of the estate ;[1] and I conceive the trustee here, is entitled to be indemnified out of the personal estate : but I do not acquiesce in the proposition, that he has a right to get that indemnity [*175] in this particular proceeding ; the result however would be, *that litigation of a much more expensive character would take place, which it is to the interest of all parties to avoid.(a)

SHEPHERD v. MORRIS.

1838 : December 17, 18.

The court will not, at the instance of a defendant, order the plaintiff to produce documents, admitted to be in his possession and to relate to the matters in question, for the inspection of the defendant.

Where, however, the plaintiff called upon the defendant to inspect a document in his, the plaintiff's possession, and to explain several errors in his accounts therein alluded to, and submits to produce the same, the court ordered that the defendant should have one month's time to answer, from the time of the plaintiff's depositing the account with his clerk in court for the defendant's inspection.

Whether a plaintiff can deposit a document with his clerk in court, and compel the defendant to inspect it before answering ? *Quere.*

THIS was a motion on the part of the defendant, that the plaintiff should leave certain documents with his clerk in court for inspection under the following circumstances :—

According to the allegations of the bill, the plaintiff, a Roman cement manufacturer, employed the defendant, as his commission agent, for the sale of cement, allowing him for his trouble a stipulated per centage on the amount received ; that the defendant from time to time rendered accounts to the plaintiff, but which the plaintiff, relying on the integrity of the defendant, did not very accurately examine.

(a) On the recommendation of the court, the parties compromised all their differences.

[1] *Vide Cockrane v. Robinson*, 11 Sim, 378.

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In 1836, the plaintiff borrowed of the defendant a sum of 750*l.*, for which he gave bills of exchange and deposited a lease as a security. In December, 1837, the defendant quitted the employment of the plaintiff, and afterwards brought an action at law for recovery of 700*l.* and interest, the amount due on one of the bills of *exchange. The bill alleged, that [*176] no settlement of accounts was come to between the plaintiff and defendant, at the time when he quitted the employment of the plaintiff, or at any other time subsequently; and that the plaintiff had since discovered, that the defendant's accounts contained many inaccurate and false entries, overcharges and omissions of and concerning his sales, receipts and payments, on account of plaintiff, and the commission owing to him in respect thereof; and had received various moneys for which he had not credited the plaintiff; and that there remained other circumstances of false and erroneous entries yet undiscovered. The bill then contained the following statement: "That by means of such false and inaccurate entries and omissions, he has been defrauded of sums to a considerable amount in the whole; and that the sums for which the said George Morris has taken credit and retained a commission as received by him, but for which receipts he has not given plaintiff credit in account, amount to some hundreds of pounds.

"That such appear and are shown to be the facts in and by a report in writing, which hath been made to plaintiff by Robert Copeland an accountant, upon and after an investigation of the accounts of the said defendant; and which report is now in the possession of plaintiff's solicitor, and plaintiff is willing that said defendant should inspect same, and he ought to inspect the same and explain, if he can, the several errors, omissions and false entries in his accounts therein alluded to." The bill contained the proper interrogatories corresponding to all these statements, and prayed, that the accounts might be taken between the plaintiff and defendant; and that the lease and bills might be declared to stand as a security for the balance which might be found due to the defendant, and for an injunction to restrain proceedings at law.

*A motion was now made, on the part of the defendant, to the follow- [*177] ing effect: That the plaintiff may, within a week, leave with his clerk in court the *cash book* kept by the defendant as the commission agent of the plaintiff, and the several *weekly accounts* sent by the defendant to the plaintiff, containing the account of the sales of cement, and the receipts and payments from time to time in respect thereof, and all *letters written by the said plaintiff to the said defendant* relating to the said accounts and addressed Messrs. Shepherd & Co., and also *the report in writing of Robert Copeland the accountant* mentioned in the said plaintiff's amended bill, and *all other documents and vouchers relating to the accounts between the said plaintiff and defendant*, and all *other accounts and documents* which the plaintiff by his said amended bill requires the said defendant to explain and in the possession of the said

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plaintiff, with liberty for the defendant, his clerk in court, agent or solicitor to inspect the same, and to take copies or extracts therefrom.

The motion was supported by an affidavit of the defendant denying the false entries, overcharges, &c., but swearing that he was wholly unable to show that there were any such false entries, overcharges, &c., without an inspection of the cash book, weekly reports, letters, and also the report in writing of Copeland, an accountant mentioned in the plaintiff's amended bill, and all other documents and vouchers relating to the accounts between the defendant and the plaintiff, and all other accounts and documents which the plaintiff, by his amended bill, required the defendant to explain.

There was an affidavit filed on the part of the plaintiff to show [*178] the great inconvenience and difficulty, and the "injury to his trade, which would result from the inspection and depositing of the documents.

Mr. Pemberton and Mr. Willcock, in support of the motion.

Mr. Kindersley, contra.

Anon.,(a) Spragg v. Corner,(b) Wynne v. Griffith,(c) Micklethwait v. Moore,(d) Pickering v. Rigby,(e) Princess of Wales v. Lord Liverpool,(g) Jones v. Lewis,(h) Penfold v. Nunn,(i) were cited.

THE MASTER OF THE ROLLS, after referring to the Practical Register, page 161, *Hampden v. Hampden,(k) Pickering v. Rigby,(e) Jones v. Lewis,(l)* overruled by Lord Eldon,*(m)* and the *Attorney General v. Brooksbank,(n)* said, from the authorities I am satisfied that I cannot order the plaintiff to produce any of the documents.[1]

The question then is, whether I have authority to make an order to enlarge the time for the defendant's putting in his answer until the accountant's report shall have been produced by the plaintiff. The original bill in the case before me seeks an account, and states errors which the defendant has made in the accounts rendered by him to the plaintiff, from time to time, [*179] whilst he was in the plaintiff's service, some of which "are alleged to be wilful; all the statements in the original bill are answered in some shape or other; and then the plaintiff amends his bill, charging the defendant

(a) 2 Dick. 778.

(b) 2 Cox, 109.

(c) 1 Sim. & Stu. 147.

(d) 3 Mer. 292.

(e) 18 Ves. 484.

(g) 1 Swans. 114. [Lord Langdale, M. R. considers the decision in this case as "founded on principles, which upon examination would fully support it." See the note of Am. Ed. infra p. 180.]

(h) 2 Sim. & Stu. 242; 4 Sim. 324.

(i) 5 Simons, 409.

(k) 1 Bro. P. C. 250.

(l) 2 Sim. & Stu. 242.

(m) 4 Sim. 324.

(n) 1 Younge & J. 439.

[1] The defendant's proper course was to file a cross bill. A cross bill was afterwards filed in this case; but the questions which then arose, have no connection with the points involved in the above decision. Vide S. C. 4 Beav. 252. As to the necessity of a cross bill, in similar cases; vide *the Commercial Bank of Buffalo v. the Bank of the State of New York*, 4 Hill, 516. *Kelly v. Eckford*, 5 Paige 548. *Brown v. Newall*, 2 Myl. & Cr. 573, 574. 2 Sim. & Stu. 244, n. 3. *Taylor v. Heming*, 4 Beav. 238.

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with having made false entries and mistatements in his accounts. [Here his Lordship read that part of the bill relative to the report in writing made by the accountant in the possession of the plaintiff's solicitor.] It is clear the defendant cannot know, without the production of the report in writing, what the alleged mistatements are. The plaintiff then charges that it is the defendant's duty to inspect the report and answer the charge; but this duty the defendant cannot comply with, unless the plaintiff will permit him to inspect the document in question. It is impossible to allow the plaintiff to say, that the defendant shall not have such inspection, and at the same time permit him to call for an answer stating the result of such inspection. A question has sometimes been made, whether a plaintiff, having deposited a document in the hands of his clerk in court, can call on the defendant by the bill to inspect it there. Can he in such a case compel the defendant to go and inspect the document when it has been deposited? (a) But it is unnecessary in this case to decide that point, for the plaintiff here offers to deposit, and the defendant is willing to inspect, the document when deposited. In *Farnsworth v. Yeomans* (b) the defendant obtained an order for further time to answer, because the document was not produced for inspection as soon as it ought to have been; in the present case the defendant is required to inspect, and the plaintiff says he may inspect, if he will pay the costs of the present motion, which the plaintiff alleges was unnecessary. If the *plaintiff [*180] refuses the inspection except on terms, that amounts to a refusal and cannot be allowed. I am of opinion, then, that the defendant is entitled to an order for one month's time to answer, after the plaintiff has deposited with his clerk in court the accountant's report, as to which documents alone an order can be made.[1]

(a) See the observations of Lord Eldon in *Taggart v. Hewlett*, 1 Mer. 499; and *Auriol v. Smith*, 18 Ves. 201, and 204.

(b) 2 Mer. 142.

[1] In a later case (July, 1841) a similar question arose before the Master of the Rolls, who, although refusing an order upon a plaintiff to produce documents, yet in conformity with his decision in *Shepherd v. Morris*, extended the time to answer. "This is an application (he says) of a description which is not very often made. Only one similar case," (doubtless alluding to the above,) "has come before me; and I believe there are very few cases of this description to be found in the books. It is, however, a motion which is quite founded in justice, if the circumstances of the case be such, as to render it proper, according to the practice of the court, to grant the application. The plaintiff by his bill states, that he has in his possession certain documents which he does not set forth, not because they are not a material part of his case, but on account of the expense, and he offers to produce or deposit them. The question which is raised on this occasion is, whether he is to exclude the defendants from that which he offers by his bill, and still avail himself of the process of the court to compel the defendants to put in their answer. I am of opinion, that there is sufficient authority for saying that he is not entitled to do so. If a plaintiff refer in his bill to documents in his possession as forming part of his case, then, whether he does or does not offer to produce them, he cannot call on the defendant to answer until he has seen the documents which are necessary for his answer. The court has acted on that principle from the earliest period, and the case of the *Princess of Wales v. Earl of Liverpool* was by no means the first case on the point. Judges of great experience have said that they could never understand on what principle that case was founded, but I believe it is founded on principles, which upon examination would show —"

 1838 —Hopkinson v. Roe.

Extract from Order.

"The court doth make no order on the motion for the production of the papers, therein mentioned; but the plaintiff offering, by his amended bill, to produce, for the inspection of the plaintiff, a certain report in writing of Mr. Copeland in the pleadings named, and referred to in the said notice of motion, but not having deposited the same with his clerk in court, let the defendant have one month's time to answer the plaintiff's amended bill, from the time of being served with a notice that the said report, is so deposited with the plaintiff's clerk in court, and ready for his inspection."

 HOPKINSON v. ROE.

1838: November 19, 20.

Executors held, under the circumstances, justified in appointing an agent to get in the testator's debts, and in allowing him a salary for his trouble.

Witnesses having been examined *viva voce* in the Master's office, it is irregular afterwards to receive their affidavits in evidence.

The costs of transferring funds, from the name of a testator into the names of the executors, disallowed.

The sum to be allowed executors for the expenses of transferring a large sum of money into court is one guinea, and extra brokerage, was therefore, disallowed.

THIS case came before the court upon exceptions to the Master's report.

The testator, a tailor, accumulated a considerable fortune, exceeding 20,000*l.*, a large portion of which consisted of outstanding debts. By his will he appointed four executors, two of whom renounced; the other two, Mr. Hopkinson and Mr. Stones, accepted the trusts; the former was a banker, the latter a linen draper. They appointed an accountant to collect

[*181] the book debts, which *were very numerous (nearly 400,) and the Master had allowed the executors in their accounts a sum of 246*l.* for the accountant's commission, being after the rate of two and a half per cent.

As to this allowance there were cross exceptions: the plaintiffs objected that the Master ought not to have allowed any sum whatever for the ac-

port it. What is asked in this case is, that the plaintiff shall produce the documents. I am of opinion that I have no jurisdiction to make such an order. But the next part of the application is, that the defendants may have a certain time to answer after the documents have been produced. This is what the court has done before, and which it is expedient to do in cases which fall within the rule." *Taylor v. Heming*, 4 Beav. 235. And see *Wedderburn v. Wedderburn*, 2 Beav. 212. Although, in general, a defendant has no means of compelling a plaintiff to produce papers to be used as primary evidence against himself, except by a cross bill; yet if a paper has been produced, and used as evidence before an examiner, by the plaintiff, if he subsequently withdraw it, and refuse to let the defendant or his witnesses inspect it, the court will, on motion, compel its restoration to the custody of the examiner for the purposes of the examination. *The Commercial Bank of Buffalo v. The Bank of the State of New York*, 4 Hill, 516.

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countant; on the other hand, Mr. Stones, by his exceptions, insisted that the Master ought to have allowed five per cent.; while Mr. Hopkinson, the co-executor, was satisfied with the allowance of two and a half per cent., as to which he supported the Master's report.

Mr. *Pemberton*, Mr. *Kindersley* and Mr. *Koe*, for the plaintiffs, argued, that executors were, under very special circumstances only, allowed to employ an agent to perform the duties which by accepting the office of executors, they had undertaken to perform. *Weiss v. Dill*.(a) In that case, the circumstances of which were very special, two and a half per cent. was allowed for the remuneration of an agent employed by the executors; but Sir John Leach doubted whether the Master ought to have made them any allowance. Here, they contended, no special circumstances had been shown which authorized the employment of an agent to get in the debts.

They urged also, that Mr. Stokes, the surviving partner of the testator, would willingly have collected the debts without remuneration, for the sake of the connection; and as to the allowance of five per cent., they objected that it was excessive and that Mr. Stones had entered into [*182] an agreement with the accountant for an allowance of two and a half per cent. only.

Sir C. *Wetherell* and Mr. *Girdlestone*, for Mr. Hopkinson, contended that the Master had exercised a sound discretion in making the allowance of two and a half per cent.; that it would be most unreasonable to suppose that a banker, by proving the will of a tailor, thereby took upon himself the duty of personally collecting the debts of his testator, especially in this case, where the debtors were exceedingly numerous, and resided in different parts of the world, and where some of the debts were very small.

Mr. *Spence* and Mr. *Wood*, for Stones, contended for the allowance of five per cent.

Mr. *Temple*, Mr. *Tinney*, Mr. *Stinton* and Mr. *Beavan* appeared for other parties.

THE MASTER OF THE ROLLS said that the surviving partner was not in all cases the proper person to collect the debts,[1] as he might have an interest in conciliating the debtors, for the sake of their future custom, and in refraining from pressing for payment; and without determining the amount which the Master ought to have allowed, his Lordship said, he considered

(a) 3 Mylne & K. 26.

[1] "It appears to be a well settled principle of commercial law that upon the dissolution of the firm, by the death of one of the co-partners, the survivor is entitled to close up the affairs of the concern; and that this court will not appoint a receiver, and deprive him of that right, if he is responsible and acts in good faith. Here, there is no pretence that the defendant is not perfectly responsible; and the affidavits show that he is engaged in closing up the affairs of the firm, by a competent agent with all reasonable diligence." *Walworth, Ch., Evans v. Evans*, 9 Paige, 180.

1838.—Hopkinson v. Roe.

that, under the circumstances, the executors were justified in employing an agent to assist them in collecting the debts of the testator.[1]

Another point raised on these exceptions was this :—In the proceedings in the Master's office, the evidence had been taken *viva voce* under the [*183] sixty-ninth order, *1828;(a) after which the Master had received affidavits, from the same parties, to supply some defects in the proofs, and there having been no consent or acquiescence on the part of the persons who complained of this proceeding,

THE MASTER OF THE ROLLS considered the objection good, and allowed the exception which embodied it.

Another exception taken by Stones was, "That the Master had not allowed to the executors any sum of money in respect of commission and private transfer, paid by him and his co-executor to a stock-broker, in respect of a transfer of 7000*l.* new four per cents. and 4000*l.* three per cent. consols, standing in the name of the testator at his death, into the names of him and his co-executor; whereas the Master ought to have allowed 14*l.*"

It was objected by the plaintiffs, that the transfer was useless, as the stock should have been transferred directly by the executors, from the name of the testator into the names of the legatees or purchaser, without incurring the expense of the intermediate transfer.

THE MASTER OF THE ROLLS was of that opinion, and overruled this exception.

Mr. Stones, the executor, also took an exception to the Master's report, on the ground, "That the Master had allowed 1*l.* 1*s.* for commission [*184] paid by the executors to a stock-broker, in respect of a transfer, under an order of court dated the 4th of December, 1830, into the name of the Accountant General, of the sum of 14,648*l.* three per cent. consols, and of a further sum of 4666*l.* new three and a half per cents., standing in the names of the executors;" whereas he ought to have allowed 12*l.* 1*s.* 6*d.*

For the plaintiffs it was contended, that the employment of a broker was only for the purpose of indentifying parties, which was unnecessary when money was paid into court; that the broker of the Accountant General, whose regular charge was 1*l.* 1*s.*, should have been employed; that by the uni-

(a) Russ. Appendix, 23.

[1] An executor or guardian may employ a clerk or agent, and charge the estate with the expense, where from the peculiar nature or situation of the property, the services of such clerk or agent will be beneficial to the estate; but for his own services he must be confined to the allowance by way of commissions, as fixed by law. *Vanderheyden v. Vanderheyden*, 2 Paige, 287. *McWhorter v. Benson*, Hopk. 37. *Cairns v. Chaubert*, 9 Paige, 164. Trustees are not authorized to employ a clerk, and pay him out of the income of the estate for the performance of services which the testator intended the trustees, or any of them, should perform in person. *Hawley v. James*, 5 Paige, 485. 3 Myl. & Cr. 51, n. 1, and see *ibid.* n. 2.

1839.—Cutbush v. Cutbush.

versal practice in the Master's office, 1l. 1s. only was allowed for a transfer into court; and that, therefore, the executors ought not to be allowed the 11l. thus uselessly expended by them.

THE MASTER OF THE ROLLS, concurring in this argument, also overruled this exception. (a)

CUTBUSH v. CUTBUSH.

1839: January 23, February 26, March 16.

A testator directed his widow to carry on his business, until his youngest child should attain twenty-one; and, for that purpose, gave her the "entire use, disposal and management of the capital, stock and effects which should be in, due and owing or belonging to him, in his said trade," at the time of his decease; and he authorized his executors to augment the capital employed therein; the executors renounced, and the widow took out administration: Held, that the specified property of the testator only was liable to the debts contracted by the widow in carrying on the trade.

THIS suit was instituted for the administration of the estate of the testator.

Thomas Cutbush, by his will (after nominating and appointing Alexander Randall and John Cutbush to be "trustees and executors [*185] thereof, and after directing his said executors to pay and discharge his debts, funeral and testamentary expenses, out of his personal estate) willed and directed, that his wife, Ann Cutbush, should carry on, manage or conduct his trade or business of a plumber, painter and glazier, at Maidstone, until his youngest child for the time being should attain the age of twenty-one years, if his said trustees and executors should so long approve thereof, and for the purpose of enabling her to carry on, manage and conduct the said trade or business, the said testator directed that she should, during the same period of her carrying on the same, have the occupation of the messuage or dwelling house in which the same was then carried on, and the entire use, disposal and management of the *capital, credits, stock and effects* which should be then due owing or belonging to him in his said trade or business at the time of his decease: and he thereby authorized and empowered the trustees or trustee for the time being of that his will, so long as his trade or business should be carried on by his wife as aforesaid, from time to time to augment or diminish the capital employed therein, according to the exigencies thereof, and as they might in their judgment deem proper. And after giving several pecuniary legacies, the testator gave and devised unto Alexander Randall and John Cutbush all his real and personal estate, upon trust to convert and invest, and stand possessed thereof, "and of the clear gains and profits of his said trade or business so by him directed to be carried on by his said wife as aforesaid," upon certain trusts for his wife and children; and he thereby declared, that it should be lawful for his said trustees to sell and dis-

(a) The parties afterwards effected a compromise.

1839.—Cutbush v. Cutbush.

pose of his said business if they should deem it most prudent and advisable so to do : and to stand possessed of the money arising from such sale upon the same trusts.

[*186] *The executors declined to act, and administration was granted to the widow, who, after the death of the testator, continued to carry on the trade, in the course of which she had incurred several debts to the petitioners and other persons, for goods for the purpose of the trade ; she had, however, dissipated the assets and become insolvent : 600*l.* was due from her to the testator's estate, and 700*l.*, for debts incurred by her, remained unpaid. The petitioners carried in their claims before the Master to have the amount of the subsequent trade debts, as well as those contracted by the testator himself, paid out of the testator's assets. The Master, however, rejected all claims for debts which had been incurred by the widow after the testator's death.

The creditors whose debts had been contracted, by the widow, subsequently to the death of the testator now presented a petition, insisting that they were entitled to be paid out of the testator's estate, or at least to have the estate marshalled, so that they might stand in the place of the testator's creditors who had been paid by the widow, out of the property specifically directed to be employed in carrying on the trade, and which, at all events, was liable for subsequent debts : the petition prayed that the Master might be directed to receive proof of the petitioners' debts, and that the same might be paid out of the testator's estate.

None of the children had attained twenty-one.

Mr. *L. Lowndes*, in support of the petition, contended, that the whole assets of the testator were answerable for the debts incurred in carrying on the trade for the benefit of his estate.

[*187] *Secondly, that the widow had most probably paid off the debts existing at the testator's death, with the assets which were clearly liable to the claims of the petitioners, and even out of the produce of the goods furnished by the petitioners after the testator's death ; in which case, he contended, the petitioners were entitled to have the assets marshalled, and to stand in the place of the creditors so paid.

Mr. *Pemberton*, and Mr. *K. Parker*, for the testator's children, contended, that the testator had limited the portion of his estate which was to be embarked in the trade, and which portion alone was liable to the claims of subsequent creditors.

Ex parte Richardson,^(a) *Ex parte Garland*,^(b) were cited.

Mr. *Kindersley* and Mr. *W. C. L. Keene*, for the widow.

THE MASTER OF THE ROLLS:—According to my present impression, I think the testator has not embarked more of his property in the trade than was therein at the time of his death : he intended to give a discretion as to

(a) 3 Mad. 138.

(b) 10 Ves. 110, and see *Thompson v. Andrews*, 1 Mylne & K. 116.

1838.—Willis v. Curtois.

augmenting it, not to his widow, but to his trustees and executors. It seems to me, that any person dealing with one carrying on trade must be taken to rely on the personal liability of the party conducting it; but the security is not limited to the personal credit of the party where the testator has directed the trade to be carried on with *his assets; without autho- [*188] rity in the will, executors have no right so to deal with the property of the testator and carry on trade with the assets; a party therefore who relies on the credit of the testator's estate, should look to the will to ascertain the extent to which the testator has authorized his assets to be embarked in the trade; and if any one had looked at this will, he would have seen that it was limited to the "capital, credits, stock and effects which were due, owing or belonging to him in the said trade or business at the time of his decease." I will, however, look into the case, and mention it again; perhaps, in the meantime, some authorities may be found on the point.

No further authorities having been produced,

February 26.—THE MASTER OF THE ROLLS said, I have looked into this case, and remain of the same opinion, that the petitioners, who were trade creditors, have no demand on the general assets of the testator, but only on that part which is specifically described in the will of the testator, and which he directs his wife shall have the sole control of.

The petitioners are entitled to an inquiry, as to what has become of this portion of the assets, but it must be at their own expense.

*WILLIS v. CURTOIS.

[*189]

1838: December 14.

A testator, having three places of residence at A., B. and C., bequeathed the one at A. to his nephew; and also "all his carriages, horses, implements and his live and dead stock and chattels" in and about the house and premises at A.; "and also his household goods and furniture, pictures, plate, linen, china, liquors of all sorts and brewing vessels, and likewise his watches and personal ornaments:" Held, that the household goods, furniture, &c. at B. and C. passed by the bequest;—but whether a bust would pass under the latter words, *quere*?

Manuscript notes of a physician, of his attendance on a patient, and which were bound up in volumes, Held to pass under a bequest of "all and every my books in and about my house" at A.

A pocket-book and a case of instruments, usually carried about the person of a testator, Held not to pass under the words "personal ornaments;"—but whether a gold pencil case, tooth-pick case, lip-salve box and eye-glass, similarly circumstanced, would pass, *quere*?

THE questions in this case arose on the construction of the will of Dr. John Willis.

It appeared that he had three places of residence: namely, his town residence in Tenterden Street, a residence at Shillingthorpe, where there was an establishment for the care of insane patients, and another establishment of

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the same kind at Greatford. These two establishments were conducted by him in partnership and with the assistance of his nephew, the present plaintiff, who was engaged in the same branch of the profession.

By his will, dated in 1835, after devising to the plaintiff, Francis Willis, his messuages, &c., at Shillingthorpe; and having also devised to him all his houses, &c., of which he was seised or entitled for an estate of freehold or for terms of years, he proceeded in the following words:—

“I give to my said nephew, Francis Willis, (the plaintiff,) all the live and dead stock at Shillingthorpe aforesaid; I give to my said nephew, Francis Willis, all my right and interest in a certain lease of the house, [*190] buildings, lands and hereditaments in Greatford aforesaid, now in my occupation, from the Hon. Charles Compton Cavendish, granted to me for a term of fourteen years, five of which will have expired at Lady-day next; and I also give to my said nephew, Francis Willis, all my carriages, horses, implements and my live and dead stock and chattels in and about the house and premises I so occupy under the said Charles Compton Cavendish; and also my household goods and furniture, pictures, plate, linen, china, liquors of all sorts and brewing vessels, and likewise my watches and *personal ornaments*; I also give unto my said nephew, Francis Willis, *all and every the books in and about my house* in Tenterden Street, next hereinafter devised.” He then gave and bequeathed all that his messuage or tenement, hereditaments and premises situate in Tenterden Street, unto the defendants, Peregrine Curtois and Atwill Lake and their heirs, upon trust for sale; and he directed the produce to become part of the residue of his personal estate.

The testator gave the residue of his personal estate to the defendant Curtois, and appointed him and Mr. Lake his executors.

At the time of the testator's death, he had furniture and effects at his three residences at Greatford, Shillingthorpe and in Tenterden Street; and, amongst other articles in Tenterden Street, there was a bust of the plaintiff's grandfather, and thirty-two uniformly bound volumes of manuscripts of Dr. John and Dr. Robert Willis, which contained copies of the daily reports of their attendance, as physicians, upon his late Majesty, King George the Third, to the Queen in council; and one MS. journal, containing private memoranda and observations on the state of health and malady of his late Majesty.

[*191] *The testator also possessed an ivory tooth-pick case with a portrait of his father in the centre, a gold pencil-case, a silver lip-salve box, a gold eye-glass, a pocket-book and a set of instruments, which he usually carried about his person.

The questions in the cause were, first, whether the plaintiff was entitled to the furniture, &c., in the houses in Tenterden Street and Shillingthorpe, as well as those in the house at Greatford; secondly, whether the MS. books passed under the gift of “all and every the books in and about the house in

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Tenterden Street," the defendant contending that they were mere loose memoranda bound together and did not pass, and insisting that, from the nature of their contents, they ought not to be published or divulged, and ought to be delivered to his Majesty; thirdly, whether the bust passed under the words household goods, &c.; and fourthly, whether the tooth-pick case, &c., passed under the words "watches and personal ornaments."

Mr. Pemberton and Mr. L. Lowndes, for the plaintiff.

Mr. Kindersley and Mr. J. Russell, contra.

Rawlings v. Jennings, (a) *Allen v. Allen*, (b) *Slanning v. Style*, (c) were cited.

THE MASTER OF THE ROLLS:—The first question that arises, is upon the household goods, furniture and other things which have been particularly adverted to. From the nature of the dispositions which were made of the property, it would seem probable, that the testator would give his furniture at Shillingthorpe to the gentleman to whom he gave the house, and who was to carry on the establishment there; and [*192] would seem to be improbable that he intended to give to him the household furniture in his house in Tenderden street, which he directed to be sold and converted into money: but the words of the will must determine how that is to be.

After giving certain portions of his property to his nephew, he proceeds thus: [his Lordship stated the terms of the bequest.] The first question in this case arises on the effect which is to be given to those last words, it being contended, on the part of the plaintiff, that this constitutes a distinct gift of all his household goods and furniture, pictures, plate, linen, china, liquors and so on, and likewise his watches and personal ornaments wheresoever they might happen to be at the time of the testator's death; and it being contended, on behalf of the defendant, that this must be restricted to such things as were situate at Greatford, and no where else.

It is to be remarked, that if it was his intention to make that restriction, he might easily have adopted a mode of doing it, different from that which is here adopted, for nothing would be more easy than for him to say, "all my carriages, horses, household goods, &c., at Greatford;" this would have been the natural and easy way of doing that, which it is contended, on the part of the defendant, he intended to do. Another mode which he might have adopted was by the addition of a single word; he might have said, "And also my household goods and furniture *there*," which would have made it perfectly clear and distinct. He has not done either of those things, and the argument used on this occasion is this: that the testator has said, "I also give my said nephew all my carriages, &c., at Greatford, and also all my household goods, &c.," the word "give," being connected with [*193] both those parts of this sentence. This circumstance is certainly to be

(a) 13 Ves. 39.

(b) Moseley, 112.

(c) 3 P. Williams, 334.

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taken notice of; and we must consider what it was that the testator was likely to have done, and what was probably the meaning of the words which he has used. The "household goods and furniture," &c., might very well have been applied to such things as were at this particular place; but the words "likewise my watches and personal ornaments," seem incapable of that construction: personal ornaments were things that he was likely to have about him, and it is not likely that he should join them to things he might have at a particular place; and I do not think that the words admit of the interpretation attempted to be put on them. It is not likely, *a priori*, that he intended to give all his furniture in Tenderden street; it is very likely he intended to give the furniture at Shillingthorpe, and those circumstances might neutralize one another; but the words "all my household goods and furniture" not being words connected with anything else, and no reason appearing to show that it was meant they should be confined to a particular locality, it appears to me that they must be construed in the general signification here expressed, and that the gift, therefore, is of all the household goods, &c. [1]

The next question that arises is on the following sentence in the will: "I also give unto my said nephew, Francis Willis, all and every the books in and about my house in Tenterden Street."

The testator seems to have had a library of printed books, and had also in his house in Tenterden Street a collection of books bound into volumes, which contained manuscript notes of his attendance upon the late [194] King, George the Third. Those volumes, no doubt, are *volumes of very considerable value and may be considered to have been made by the testator himself for many important purposes; it was important both to himself and the public that he should make them. He was engaged in an attendance that would naturally call on him, from time to time, to give information, with all the particulars which, with certain limitations, it may be considered he was bound to do, and which, we know from history, he was several times compelled to do; it was therefore his duty to preserve these, and to preserve them with the greatest care, and he accordingly seems to have done so: they were very valuable, not only as furnishing him with the results of medical experience, but as showing, from experience, what was the sort of even moral conduct which the physician, under such delicate circumstances, was bound to pursue, and would afford to any person a most valuable example of what ought to be done under similar circumstances. These books are the subject of the present controversy, and the question is, whether they come under the description of things meant by this clause, "all and every the books in and about my house in Tenterden Street." That they were books is not denied: whether they are to be considered as books coming under the particular description, is the matter in controversy,

[1] As to the construction of a legacy in reference to the locality of the subject bequeathed, see further, *Brooke v. Turner*, 7 Sim. 671. *Cole v. Fitzgerald*, 1 Sim. & Stu. 189. S. C. 3, Russ. 301.

1838.—*Willis v. Curtois.*

it being alleged they are not, because they ought to be considered as mere loose memoranda, put together for the convenience of the testator, in a form in which they were more easily capable of being consulted, and ought not to be considered in the character of books; and it has been contended, that under these words, nothing would pass but such printed books as are in the habit of being sold in booksellers' shops. Recollecting, however, that in this case the legatee to whom these books were given was a medical gentleman engaged in the like branch of the profession as the testator—was a person, therefore, *to whom books of this sort would of ne- [*195] cessity be most peculiarly valuable—a person who might be placed in precisely the same circumstances as the testator was, and, if he should be so, that these books would be of more value to him than they could be to any other person in existence; and taking these circumstances into consideration, which I think I cannot avoid doing, in the construction of this will, and seeing the words are sufficient to comprise these books, and that the great probability is, the testator, if his attention had been drawn to them, would have passed those books by specifically naming them, I think, (the words being sufficient,) I must consider that those books passed under that clause.

The next question raised is about a bust found in Tenterden Street.

I have a little doubt about the bust. The question is, whether the testator intended to pass it by these words, "my household goods and furniture, pictures, plate, linen, china, liquors of all sorts and brewing vessels, and likewise my watches and personal ornaments." Now I may observe here, that unless it passed under the words "household goods and furniture" it can hardly be said to pass under the words "pictures, plate, linen, china, liquors of all sorts and brewing vessels," there being no general words following—no such words as "effects" to give a right to construe the former words more extensively and apply them to all things *ejusdem generis*; but the words following are "and likewise my watches and personal ornaments:"—I feel some doubt about that, and I shall look and see how far the authorities bear upon it. The inclination of my opinion is, that looking at the particular words of the will, the bust does not pass. I shall see how the authorities are on that subject.[1]

*The next question is as to the personal ornaments: the words [*196] are "my watches and personal ornaments." The question applies to some few things said to be of small value, viz. a tooth-pick case, a pencil-case, an eye-glass and a case of instruments, and, as it is now said, a pocket-

[1] As to what will pass under the designation of "household furniture," see further *Cole v. Fitzgerald*, 1 Sim. & Stu. 189. S. C. 3 Russ. 301. *Cremorne v. Antrobus*, 5 Russ. 312, 321, n. 1. *Plate* does, but *books*, it seems, do not. Pictures may be included as part of the ornamental furniture of the house. Ibid. Gold and silver coins, trinkets and things of that nature, do not pass under the description of "furniture belonging to the dwelling house," unless there are special circumstances showing that those articles were so used and disposed of in the house, as to be part of the ornamental furniture of the house, or in some way connected with it. Ibid. When fixtures come within the denomination, see *Paton v. Shepard*, 10 Sim. 186.

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book. I do not consider the pocket-book and case of instruments personal ornaments.

With respect to the other things, they are articles of utility ; and the question seems to be, whether a thing that is ornamental and capable of being applied to useful purposes, is, or is not, to be considered as an ornament. I think there was a case in which such a point had to be considered.[1] There are some things of no personal use, a common ring for instance, which may be set round with diamonds and be of extreme value, and yet of no use except as an ornament ; but it may be said, if you convert that into a signet ring and seal letters with it, in consequence of that useful purpose to which it is applied, it becomes an article of utility as well as of ornament : a shirt pin is equally useful, and various things of that sort might be suggested : a pencil-case certainly is useful as containing the pencil. I think there was some decision in the case I have a recollection of, relative to similar articles, and therefore, I shall look to it ; the inclination of my opinion is, that though those things were capable of being connected with personal use, yet they were considered as personal ornaments in the sense in which the testator intended them. If you come to a minute definition, they may not be so ; but at the same time they may be put in such a form and appearance that the ornamental part is paramount to the useful part, and consequently they might pass as ornaments. I will look for the case.(a)

[*197]

*HOWES v. HOWES.

1839 : February 21, 25.

An order *nisi* to dissolve the common injunction, obtained after exceptions to the answer have been filed, is irregular.

IN this case the plaintiff obtained a common injunction for want of an answer ; the defendant put in his answer on the 23d of January ; he did not, as he might have done, immediately obtain an order *nisi* to dissolve the injunction, and on the 9th of February, the plaintiff delivered exceptions to the answer. The plaintiff was bound to wait eight days before he referred the exceptions, and in the meantime, i. e. on the 15th of February, the defendant obtained, and on the following day served, an order *nisi* to dissolve the injunction : on the 18th of February, the plaintiff obtained an order to refer the exceptions, and on the 21st he moved to discharge the order *nisi* for irregularity.

Mr. James Russell, in support of the motion, relied on *Williams v.*

(a) No judgment was given on the reserved points, as, after what had fallen from the court, the solicitors of the parties intimated their desire of arranging the differences.

[1] The Master of the Rolls probably refers either to *Attorney General v. Harley*, 5 Russ. 173, or, *Cremorne v. Antrobus*, id. 312 ; in both of which cases, he, then Mr Bickersteth, was counsel.

1839.—Howes v. Howes.

Davis,^(a) where it was held, that an order to dissolve an injunction *nisi*, obtained after exceptions filed to the answer, was irregular.

Mr. *Bethell*, contra, referred to the fifth order 1828,^(b) and relied on 1 *Smith's Chancery Practice*,^(c) to show that the case of *Williams v. Davis* was not followed in practice.

Mr. *James Russell*, in reply, cited *Candler v. Partington*^(d) to show that the plaintiff, being in possession of the injunction, could not refer the exceptions *instantly*.

THE MASTER OF THE ROLLS:—In the case of *Williams v. [198] Davis*^(e) it was expressly decided, that it was irregular to obtain an order *nisi* to dissolve an injunction, after exceptions to the answer were filed; but a doubt having been raised, whether that case was decided in conformity with the practice of the court, and it being alleged on respectable authority that a contrary practice had prevailed, I thought it right to make inquiries on the subject: and in the result I am informed, that among the officers of the court, there is a general impression that it is regular to obtain an order *nisi* to dissolve an injunction after exceptions to the answer are delivered, and that it would be very disadvantageous to the defendant if the practice were otherwise; but no satisfactory evidence has been produced to me, that such practice has actually prevailed at any time; and considering that, under the general orders, the defendant is at liberty to obtain an order *nisi* to dissolve the injunction as soon as his answer is filed, and before exceptions to it can be delivered, I cannot say that he appears to me to have any reason to complain of hardship, if, having lost this advantageous position by his own neglect in waiting till exceptions are delivered, he should have still further to wait, till the exceptions are disposed of, before he recovers the same position.

He may, at any time after the exceptions are delivered, obtain an order to refer them, and if he does not, the plaintiff must obtain such order within a very limited time.

At the same time, it does not appear to me that any inconvenience would follow from allowing the course *which has been adopted by [199] the defendant in this case, and some time might be saved by it; and if the case of *Williams v. Davis* had not been decided, I should not have been disposed to interfere.

But I do not think myself at liberty to permit a vague notion (unsupported by authorities or orders) of what is or ought to be the practice, to prevail against a clear authority, an adherence to which does not appear to me to involve any material inconvenience; the disadvantageous position, in which it is supposed the defendant would be placed, would always be avoided by his application for an order *nisi* to dissolve the injunction as soon as he has put in his answer.

^(a) 1 Sim. & Stu. 262.

^(b) 2 Russell, App. 6.

^(c) 2 ed. p. 614.

^(d) 6 Mad. 102.

^(e) 1 Sim. & Stu. 262.

 1839.—Gray v. Gray.

On the authority of *Williams v. Davis*, I consider the order which the defendant has obtained to be irregular, and it must therefore be discharged. [1]

GRAY v. GRAY.

L. C. 1811: December 6.

A resale of property, sold under a decree, ordered, in case the purchaser did not pay his money into court within a given time; and the purchaser ordered, in that case, to make good the deficiency and to pay the costs of all the proceedings.

ON opening this matter, by Mr. *Bell*, counsel of the plaintiff, it was alleged that, by an order in this cause, it was ordered, that the freehold and leasehold estates of the testator should be sold; that John Sidney purchased lot 27; and that the Master's report, which was dated the 12th of May, 1809, was confirmed by an order of the 10th of December, 1810; that a reference to the Master, to see if a good title could be made, was made on the 15th of Jan., 1811; and the Master (no one having attended for the purchaser) reported, on [200] the 18th of November, 1811, that a good title could be made: that this report had been confirmed *nisi* on the 28th of November, 1811.

On hearing the orders, the report and affidavit of service, his Lordship now ordered, that the report of the Master should be absolutely confirmed, and that John Sidney should pay the costs of this application, and all other costs incurred in confirming the said John Sidney as purchaser of the said premises, and compelling him to complete the purchase thereof; and that he should, on or before the 20th of January, 1812, pay 515*l.* into court; "and in default of the said John Sidney's paying the said sum of 515*l.* into the bank, by the time aforesaid, it was ordered that the said premises should be resold, with the approbation of the said Master, to the best purchaser or purchasers that could be got for the same; and in case the said premises should not be resold for so much money as the sum of 515*l.* it was ordered that the Master should tax the costs of such resale; and it was ordered that the said John Sidney should pay the deficiency between the said sum of 515*l.* and what the said premises should be resold for at such resale, to be ascertained by the said Master, into the bank: and it was ordered that the said John Sidney should pay the costs of such resale, when taxed." (a)

(a) An abstract of the order in this case, which is stated in 2 Smith's Chancery Practice, 205, by the name of *Sanders v. Gray*, is printed in consequence of its having been relied on in *Shellcross v. Hibberton*. Rolls, February 2, and March 6, 1839. Mr. *Lovat*, in support of the application; Mr. *Pemberton*, contra. In the latter case, however, an order was, after argument made, by arrangement between the parties, to discharge the purchaser, and that the costs should be costs in the cause. [Vide *Jackson v. Edwards*, 7 Paige 387, 1 Barb. Ch. Pract. 538.]

[1] On motion to dissolve injunction upon answer, exceptions filed are no objection to the motion, unless they affect the answer in points relating to the grounds of the injunction. *Doe v. Roe*, Hopk. 276. If exceptions to the answer have not been submitted to by the defendant, nor allowed by the Master, the court will look into them, to see that they are not frivolous; and if frivolous, they will furnish no objection to a motion to dissolve the injunction. *Noble v. Wilson*, 1 Paige 164. Et vide *Smith v. Thomas*, 2 Dev. & Batt. (No. Car.) Rep. 126. Amer. Ch. Dig. Injunction, IX. X

1839.—Haigh v. Grattan.

*HAIGH v. GRATTAN.

[*201]

M. R. 1839: March 22.

A receiver being appointed to get in the outstanding estate of a testator, the court gave leave to a party who was willing to pay a small sum due to the estate into court to do so, in order to save the poundage which would have been incurred if it had passed through the hands of the receiver.

By the decree, dated in February, 1837, it was ordered, that the Master should appoint a proper person to collect and get in the outstanding personal estate of the testator, and should make him an allowance in respect of his collecting such personal estate.

A receiver was accordingly appointed, who entered into the usual recognizances for the sum of 2445*l*.

The personal estate in England consisted of half a mortgage debt for 3900*l*. and arrears of interest.

The testator had certain life annuities, secured upon estates in Ireland, and by policies of the Royal Exchange Assurance for the sums of 2769*l*., and 2307*l*., the policies for which were in the Master's office. The life having dropped, these sums became payable.

A petition was presented by the plaintiffs, praying a reference to the Master, to see if the receiver should give any further security to be answerable for what he should receive in respect of the policies; and if the said Master should so find, then that further security might be given accordingly.

A cross petition was presented by some of the defendants, stating that the Assurance Company were willing to pay the money into court, and praying that they might be at liberty so to do, whereby the poundage, amounting to 253*l*., and other expenses, would be saved.

*Mr. Tinney and Mr. E. Lloyd, in support of the first petition, [*202] said that the petition had been presented on the supposition that the receiver was entitled to receive the amount of these policies; and that it would be unjust to deprive a receiver of the benefit of his poundage on a portion of the estate, because that part could be collected with greater facility than the rest, and thus throw on a receiver the burthen of collecting that part only of the estate, respecting which there was a difficulty; that the order for a receiver, being part of the decree, could not be altered by petition.

Mr. Pemberton and Mr. Crawford, contra, and in support of the second petition.

The receiver did not appear.

THE MASTER OF THE ROLLS said that he could not conceive that the receiver had such a vested right to collect the whole estate as seemed claimed in this case; that parties were not to create a difficulty, or to refuse to avail themselves of the facility of having the money brought into court without any expense, in order that the receiver might obtain a poundage.

 1839.—Allen v. Coster.

ALLEN v. COSTER.

1839 : April 17.

An increased allowance for maintenance made out of property of infants, for the purpose of supporting their parents who were in great indigence.

THE testatrix, by her will, dated in 1828, expressed herself as follows:—
 “I give to my executors and trustees hereinafter named and the survivors or survivor of them the principal sum of 6000*l.* new four per cent. annuities, in trust to pay the dividends, interest and produce thereof, from time to time as the same shall become due and be received, unto George Allen, of
 [*203] Northton, *laborer, to be applied by him for the maintenance and education of George Allen the younger and Elizabeth Allen*, the son and daughter of the said George Allen, of Northton, until the said Elizabeth Allen shall have attained the full age of twenty-one years, then upon trust that my said executors and trustees and the survivors and survivor of them do and shall pay and divide the said sum of 6000*l.* new four per cent. annuities, after setting apart so much thereof as will produce the two several sums of 20*l.* a year each, which I have hereinafter given to the said George Allen and to Hope Allen his wife and the survivor of them, for their lives, unto and equally between the said George Allen the younger and Elizabeth Allen, for their absolute use and benefit; and if either of them, the said George Allen the younger and Elizabeth Allen should happen to die before the said Elizabeth Allen shall attain her said age of twenty-one years, then I give the full part of him or her so dying to the survivor of them the said George Allen the younger and Elizabeth Allen, when and as soon as he or she shall attain the age of twenty-one years; and as soon as the said Elizabeth Allen shall have attained the said age of twenty-one years, or in the event of her death, then when and as soon as the said George Allen the younger shall have attained his age of twenty-one years, whereby the payment of the dividends or interest to the said George Allen the father will cease, then and from thenceforth I direct my said executors and trustees and the survivors and survivor of them, to pay the said George Allen the father, for and during the term of his natural life, and also to pay to the said Hope Allen, for and during the term of her natural life, an annuity or clear yearly sum of 20*l.* each, to be paid to them respectively, by equal half yearly payments, out of the dividends which will become due on the said new four per cent. annuities half-yearly at the Bank of England; and upon
 [*204] *the decease of the said George Allen the father and Hope Allen his wife*, I direct the said annuities of 20*l.* given to him or her who shall so die shall go and be paid to the survivor or longest liver of them the said George Allen the father and Hope Allen; then I direct that the said stocks or funds which shall have been so set apart for securing payment of the said annuity, together with all dividends and interest (if any) then due

1838.—Allen v. Coster.

or growing due thereon, shall be paid to and equally divided between the said George Allen the younger and Elizabeth Allen, in case they shall have attained the age of twenty-one years, or to the survivor of them, in case either of them shall have died under the age of twenty-one years."

The testatrix died in 1829. George Allen the elder was a person of low circumstances, being a common bricklayer's laborer, and in consequence of the misconduct of himself and wife, the guardianship of his children, who were both infants, had been committed, by the court, to other persons.

The fund now consisted of 6000*l.* new three per cent. annuities, the sum of 512*l.* 18*s.* 4*d.* bank three per cent. annuities and 25*l.* 9*s.* cash.

George Allen the elder and Hope his wife presented this petition in the cause, submitting, "that upon the true construction of the said testatrix's will, they were entitled, during the minorities of the said infant plaintiffs, to the dividends which had accrued and the accruing and future dividends on the said 6000*l.* bank annuities, from the death of the said testatrix, during the minorities of the said infant plaintiffs, after properly providing for their maintenance, education and bringing up."

"The parents were in a state of great indigence, and kept from the [205] parish by a person who charitably allowed them 10*s.* a week, until their rights on this petition had been determined.

Mr. *Kindersley* and Mr. *Rogers*, in support of the petition, contended, that this was a gift to the parents subject to a trust for the maintenance and education of the children, and that the surplus, after the performance of those trusts, belouged to the parent ;(a) and they relied on the case of *Heysham v. Heysham*(b) to show that the court might extend the allowance to the infants, in order to support the parents.

Mr. *Pemberton* and Mr. *Bird*, contra.

Mr. *Willcock*, for the executors.

THE MASTER OF THE ROLLS :—I think this is a case in which the court can increase the maintenance of the children for the support of their parents : I feel reluctant in doing it, for the conduct of the parents has been of the worst kind ; but I think, that without saying any thing as to the construction of the will, I may give to the infants the benefit of the income of the property, so as to assist the parents : to do so is evidently for the benefit of the infants themselves.[1]

a. See *Andrews v. Partington*, 2 Cox, 223. *Hamley v. Gilbert*, Jacob, 354. (b) 1 Cox, 179.

[1] "In allowing maintenance, the Court of Chancery will have a liberal regard to the circumstances and state of the family to which the infant belongs ; as for example, if the infant be an elder son, and the younger children have no provision made for them, an ample allowance will be allowed to the infant, so that the younger children may be maintained. Similar considerations will apply to a father or mother of the infant, who is in distressed or narrow circumstances. On the other hand, in allowing maintenance, the court usually confines itself within the limits of the income of the property. But when the property is small, and more means are necessary for the due maintenance of the infant, the court will sometimes allow the capital to be broken in upon. But, without the express sanction of the court, a trustee or guardian will not be permitted, of his

1839.—Green v. Holden.

[*206]

*ROBINSON v. WOOD.

1839: May 22.

Notice of motion was given for the payment of money into court, but the notice did not proceed to state that an application would be made for its investment; one of the parties did not appear on the motion: Held, that no order for investment of the fund could be made.

THIS was a motion that two of the defendants, who were executors, might pay a sum of money into court; but the notice made no mention of the investment of the money when paid in.

The motion coming on, one of the defendants did not appear, and the order was made against him on his default.

Mr. *Pemberton* asked that the money, when paid in, might be laid out in the purchase of consols.

THE MASTER OF THE ROLLS:—It is generally considered, as a matter of course, to have money invested when paid into court; but I recollect that when there were great fluctuations in the price of the stocks, it was very far from being a matter of course, the investment being then very often productive of serious inconvenience; as the motion does not refer to the subject, I cannot, in the absence of one of the defendants, make any order as to investing the money when paid in.

[*207]

*GREEN v. HOLDEN

1839: June 13.

A mortgagee was resident out of the jurisdiction: Held, that the case was not within the 1 W. 4 c. 60, the 4 and 5 W. 4 c. 23, or the 1 and 2 Vict. c. 69.

THIS was a petition praying that a person might be appointed, in the place of John Cleveland Green, to join the petitioner, William Henry Green, and the defendant, Howard Fletcher, in the conveyance of certain freehold and copyhold property.

It appeared that, in 1829, certain trust moneys held by John Cleveland own accord, to break in upon the capital." 2 Story's Eq. § 1355. See further Jac. 359, n. 1. *Wellesley v. The Duke of Beaufort*, 2 Russ. 28. *Wilkes v. Rogers*, 6 Johns. Rep. 566. *Matter of Bostwick*, 4 Johns. Ch. Rep. 104. Amer. Ch. Dig. Parent and Child, II. A testator bequeathed an annuity to his grand-daughter, to be applied whilst she was under age, in and towards her maintenance and education, in such manner as his trustees should in their absolute and uncontrollable discretion think fit, and whether her father should be able to maintain and provide for her or not. The trustees having made a very small payment on account of the annuity, and having made no provision for the maintenance or education of the infant, who had been wholly provided for by her father, the court declared that, in the event of its appearing that the father had properly maintained and educated the infant from the testator's death, he should receive the whole annuity for the time past, and till further order; he undertaking properly to maintain and educate her, to abide by the order of the court. *Stephens v. Lawry*, 1 Yo. & Coll. C. C. 87.

1838.—Green v. Holden.

Green, William Henry Green and Howard Fletcher, were advanced, on mortgage, to Samuel Fletcher and Richard Westley Fletcher, and the freehold and copyhold property in question was conveyed by way of mortgage to the three trustees accordingly.

By the decree in this suit, which was instituted by John Cleveland Green and William Henry Green, the property was directed to be sold, for the purpose of discharging the mortgage, wherein all proper parties were to join as the Master should direct. The property was sold accordingly, and the purchases confirmed by the court.

The purchasers requiring conveyances, and John Cleveland Green being permanently resident in Canada, this petition was presented for the purpose above stated, on the supposition that the case came within one of the statutes of 1 W. 4. c. 60, 4 and 5 W. 4. c. 23, and 1 and 2 Vict. c. 69.

Mr. *Pemberton* in support of the petition.

THE MASTER OF THE ROLLS declined making any order on the petition.

*Mr. *Parry*, who was with Mr. *Pemberton*, afterwards called the [*208] attention of the court to *Ex parte Whitton*,^(a) where his Lordship had held, that mortgagees and the heirs of mortgagees were within the eighth section of 1 W. 4. c. 60, explained by 4 and 5 W. 4. c. 23, s. 2. He also referred to *Re Willson*.^(b) He admitted, however, that this case did not come within 1 and 2 Vict. c. 69.

THE MASTER OF THE ROLLS still declined to make any order, saying, that doubt having arisen respecting the order which he had made in *Ex parte Whitton*, and that the act 1 and 2 Vict. c. 69, had passed for the purpose of declaring that the summary jurisdiction was given in cases where mortgagees died seised of the land without having been in possession or receipt of the rents. *Ex parte Whitton* was founded on the supposition that the 8th section of the 1 W. 4. c. 60, taken in connection with the 4 and 5 W. 4. c. 23, applied to mortgagees as well as trustees; but the act 1 and 2 Vict. c. 69, having declared that the stat. 1 W. 4. c. 60, and 4 and 5 W. 4. c. 23, should not be construed to extend to any case of mortgagees dying seised of land except those expressly provided for, appeared to him at the same time to preclude the extension of the effect of the 8th section of 1 W. 4. c. 60, by construction, to any other case of mortgage. He had been informed by the Vice-Chancellor that it had been submitted to him that the effect of section 3, of 1 and 2 Vict. c. 69, was to repeal the 6th section of the 1 W. 4. c. 60, and he, the Master of the Rolls, had stated, that in his opinion sect. 3, of 1 and 2 Vict. c. 69, had no such effect. There was a misapprehension if he had been supposed to state that the same enactment did not affect the construction which had previously been put upon the 8th section of 1 W. 4. c. 60.[1]

^(a) 1 Keen, 280.

^(b) 8 Simons, 392.

[1] Vide, *In the matter of Williams*, 9 Sim. 642.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY.

THE EARL OF ILCHESTER v. THE EARL OF CARNARVON.

1839 : March 8, 12.

The testator mortgaged two estates by demise : he specifically devised one of them, (the Blunsden,) while the other (the Marston) descended on his heir ; and he devised all his estates (except the Blunsden and Marston,) and bequeathed his personal estate to his heir, subject to the payment of his debts. The heir afterwards covenanted to exonerate the Blunsden estate from the mortgage and he subsequently joined in a deed, whereby, with the concurrence of the mortgagee, who was satisfied that the Marston estate was a sufficient security, the term, as to the Marston estate alone was transferred to trustees to secure the mortgage money. The heir by his will devised the Marston estate specifically, upon certain trusts, and he gave all his other real and personal estate to his eldest son, "subject to the payment of his debts and the fulfilment of all his contracts and obligations ;" Held, that the devisees of the Marston estate took it subject to the mortgage, and were not entitled to have it exonerated out of the personal estate of the second testator.

THE question in this case was, whether the devisees of an estate, which was subject to a mortgage, were to take it *cum onere*, or whether the mortgage was to be discharged out of the personal estate of the testator.

It will be convenient to state, that the names of the last three Earls of Carnarvon were Henry, Henry George, and Henry John George, the present Earl.

[*210] "In February, 1808, Henry Earl of Carnarvon, the first testator, being seised of the Blunsden estate, purchased an estate called the Marston estate ; to accomplish this he borrowed a sum of 8400*l.* of Lord Romney and his brother Charles Herbert ; and by an indenture of the 17th of February, 1808, he demised both the Marston and the Blunsden estates to Lord Romney and Charles Herbert, by way of mortgage, for a term of 2000 years, for securing the 8400*l.* ; and he further secured that sum by his bond and covenant. He had previously to these transactions made his will, dated the 29th of September, 1803, by which he devised the Blunsden estate to his son Charles Herbert for life, with remainder over to the children of Charles Herbert ; and he gave and bequeathed all his manors and hereditaments, except

the Blunsden estate, and also all his personal estate and effects to Henry George, afterwards Earl of Carnarvon, subject to the payment of his debts, and of the legacies thereby given.

The first testator, Henry Earl of Carnarvon, died in 1811, and his will was proved by Henry George, Earl of Carnarvon, who then became entitled to all the real estate of the testator, except the Blunsden estate, and also to his residuary personal estate, which was more than sufficient to pay the debts and legacies. The Marston estate, however, did not pass by the will, but descended to Henry George, Earl of Carnarvon, in consequence of the testator not having republished his will after the purchase of that estate.

Augusta Elizabeth Herbert, the only child of the testator's son Charles Herbert, became, after his death, entitled to the Blunsden estate; and by the settlement executed on her marriage, dated the 8th of May, 1824, the Blunsden estate was conveyed to Henry George, Earl of Carnarvon, and the Earl of Rosslyn, upon trust to sell, and to hold the *produce on [*211] the trusts therein mentioned; and Henry George, Earl of Carnarvon, thereby covenanted with James, Earl of Rosslyn, his heirs, executors, administrators, and assigns, that he, Henry George, Earl of Carnarvon, his heirs, executors, or administrators would, when and as any sale should take place of the Blunsden estate, or of any part thereof, procure a discharge of the same manor and hereditaments from all principal money and interest due on the mortgage: to the intent that the purchasers of such parts thereof as might be sold, and the trustees of such parts thereof as might not be sold, might, at the costs of the purchasers, or of such trust estate, be enabled to procure a surrender or assignment of the said mortgage term of 2000 years: and also that he the said Henry George, Earl of Carnarvon, his heirs, executors and administrators, would from time to time, and at all times thereafter, protect, exonerate and keep indemnified the said manors and hereditaments, and the trustees, tenants, owners and persons entitled of and in the same, from all principal money and interest then due by virtue of the same mortgage, and from all actions, suits, claims or demands in consequence of the non-payment thereof.

Henry George, Earl of Carnarvon, the second testator, by his will dated September, 1821, left all the real and personal estate of which he might be possessed at his death to his son Henry John George, afterwards Earl of Carnarvon, subject, however, both as to the real and personal estates, to the payment of his debts, the fulfilment of all contracts and obligations, payment of annuities with which he was chargeable, and his funeral expenses, and also subject to all legacies which he might give by his will or any codicil.

He made a codicil to his will, dated the 10th of July, 1824, and thereby gave and devised unto the *plaintiffs, the Earl of Ilchester, [*212] and Algernon Herbert, their heirs, executors, administrators and assigns, certain freehold and leasehold estates therein mentioned, comprising amongst others, the messuage, lands and hereditaments comprised in the

1839.—The Earl of Ilchester v. The Earl of Carnarvon.

thereinbefore recited indentures of the 15th and 16th February, 1808, to hold to the last-named plaintiffs, their heirs, executors, administrators and assigns, upon trust to sell the same, and out of the moneys to arise by such sale, or to be accumulated as hereinafter directed, to invest, in the manner therein mentioned, so much as would produce the yearly sum of 300*l.* and to pay the same, by quarterly payments, to the said testator's daughter, Harriett afterwards Lady Harriett Stapleton, during her life, or so long as she should continue sole and unmarried; and after her decease or marriage, the same to sink into and be considered as part of the fund thereafter directed to accumulate; and until sale of the said premises, the testator directed the plaintiffs, the Earl of Ilchester, and A. Herbert, to pay the said yearly sum of 300*l.* to the said testator's said daughter for her life, or until her marriage, out of the rents and profits of the said estates; and the said testator directed that the residue of the rents and profits of the said estates and premises, until sale thereof, should remain in the hands of the plaintiffs, the Earl of Ilchester, and A. Herbert, and to be invested by them as therein mentioned, until the same should amount to 5000*l.*; and then and so often, or sooner, if desirable purchases should offer, such sum, or so much thereof as should have been accumulated or be requisite to effect such purchases, should be laid out in the purchase of lands of inheritance, situate as therein mentioned; such lands, when purchased, to be subject to the same uses and trusts as the said testator's settled estates in Hants and Berks; and after the sales of the said

[*213] estates thereby *devised for the purpose of sale as aforesaid, the said testator, by his said codicil, directed that the residue of the moneys to arise by such sale, after providing for the payment of the said yearly sum to the said testator's said daughter, should be laid out in the purchase of lands in the counties of Hants or Berks; such lands, when purchased, to be subject to the same uses and trusts as the said testator's settled estates in the said counties; and until said purchases shall be found, the said testator directed the plaintiffs, the Earl of Ilchester and A. Herbert, to invest the moneys to arise by such sale, and the accruing interest thereof, in the manner therein mentioned. And the said testator thereby directed, that in case it should happen, by sale, mortgage or other disposition of the said devised estates and premises in his lifetime, the same should be insufficient to provide for the said annuity to the said testator's said daughter, the said annuity should abate in proportion, and not be chargeable upon any other part of his said real and personal estate; but he directed the plaintiffs, the Earl of Ilchester and A. Herbert, to use their best endeavors to provide for the said annuity as far as the said devised estates would enable them, and in any manner they might think fit and proper.

On the 9th of July, 1830, a deed was executed between Thomas D'Oyley, in whom the mortgage term of 2000 years had become vested, of the first part; Henry George, Earl of Carnarvon, of the second part; Algernon Herbert, who was the person entitled to the money secured by the mortgage, of the third

1839.—The Earl of Ilchester v. The Earl of Carnarvon.

part ; and Francis Newman Rogers, and George O. Lampriere, of the fourth part ; and thereby, after reciting that the sum of 8304*l.* then remaining due on the security of the indenture of the 17th of February, 1808, was the proper money of Algernon *Herbert, who had requested Thomas D'Oyley [*214] to assign the same to the said F. N. Rogers and G. O. Lampriere ; and that Algernon Herbert, being satisfied that the lands situate at Marston were an ample security for the sum of 8304*l.* and interest, it has been agreed that the other premises comprised in the said mortgage should not be assigned to F. N. Rogers and G. O. Lampriere ; it was witnessed that, for the consideration therein mentioned, Thomas D'Oyley assigned unto F. N. Rogers and G. O. Lampriere, their executors, administrators and assigns, the sum of 8304*l.* then remaining due on the mortgage, and all interest thereon ; to hold the same unto F. N. Rogers and G. O. Lampriere, their executors, administrators and assigns : and Thomas D'Oyley thereby assigned unto F. N. Rogers and G. O. Lampriere, their executors, administrators and assigns, the Marston estate for the then residue of the term of 2000 years, created by the said indenture of the 17th of February, 1808, subject to such equity of redemption as the same premises were then subject or liable, by virtue of the said last-mentioned indenture.

The testator, Henry George, died in April, 1833, and his will was proved by the present Earl, who being entitled thereto under the will, possessed himself of the testator's assets.

The testator's daughter, Lady Harriet, died in 1836.

The bill was filed by the Earl of Ilchester and Algernon Herbert, the trustees, and by Lord Porchester, the eldest son of the present Earl of Carnarvon, stating that 8304*l.* remained due on the mortgage (100*l.* having been paid off by Henry George, Earl of Carnarvon,) and insisting that the Marston estate had been devised to the trustees freed from the mortgage debt of 8304*l.* and interest, and *that the plaintiffs were entitled to have [*215] it paid out of the general personal estate of the second testator, Henry George, Earl of Carnarvon, or, in case of its insufficiency, out of the real estate devised to the present Earl ; and the bill prayed accordingly.

Mr. *Pemberton* and Mr. *T. H. Hall*, for the plaintiffs :—Under the trusts of the will of the late Earl, the Marston estate is now saleable ; and the question between the parties is, whether the personal estate of the last Earl, possessed by the present Earl, is or not liable to pay off the mortgage on the Marston estate, so as to leave the whole produce of that estate to be invested upon the trusts of the settled real estate : from the limitations of the settled estates, the question amounts to his, whether the defendant is entitled to the sum of 8300*l.* absolutely, or for life only.

The debt, it is admitted, was originally the debt of the first testator, who mortgaged the Marston and the Blunsden estates for securing it ; he specially devised the Blunsden estate, and the other estate descended to Henry George, to whom the testator had bequeathed his personal estate subject to the payments

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of his debts and legacies. What was the position of the property at the death of the first testator? The owner of the Blunsden estate had clearly an equity to have the mortgage paid out of the personal and the descended estates; so that Henry George, having assets, was bound to pay off the mortgage on the Blunsden estate, and in exonerating that estate from the mortgage, he must

at the same time have exonerated the Marston estate. He had not [*216] therefore the power of exercising an option *as in *Scott v. Beecher*,^(a)

but was bound in equity to discharge the mortgage. The real and personal estate did not in this case, as in *Scott v. Beecher*, wholly centre in one person, but part of the real estate was devised away: and therefore that authority does not apply. Being subject then to an equitable obligation, he entered into a personal covenant for the discharge of the mortgage; and he bequeathed his personal estate to the defendant, expressly subject to that, amongst other "contracts and obligations." He adopted the debt, which he was in equity bound to discharge, and his personal estate is therefore primarily liable to pay it.

The trusts on which the testator devised the Marston estate might have required the whole undiminished rents; and this too shows an intention on the part of the testator, that that estate should be exonerated out of his personal estate.

Mr. Tinney and Mr. E. J. Lloyd, contra:—The general rule is this, that if an estate be subject to a mortgage which is created by the testator, who specifically devises the estate, the devisee is entitled to have it exonerated out of the descended and personal estate; but if the debt be not a debt contracted by the testator, then the devisee takes it *cum onere*, and is not entitled to have an exoneration out of the personal or descended estate.

It must be admitted that Henry George, Earl of Carnarvon, was bound to exonerate the Blunsden estate out of the Marston estate, which descended;

but this was a derivative and not a primary obligation. The obligation was not personal, but affected the estate only; *and he was therefore in the same situation as the devisee and executrix in *Scott v. Beecher*. If the case stood here, independent of any subsequent dealing, it is clear that the devisees in trust would take the Marston estate subject to the mortgage.

As to the subsequent transactions, the covenant of Henry George, Earl of Carnarvon, which was merely to exonerate the Blunsden estate, did not operate as an adoption by him personally, of the debt of his testator; neither would a bond or covenant to pay the amount have had that effect; *Barham v. The Earl of Thanet*.^(b) There, Sir John Leach laid down the law in these words, "If an estate descend to the heir subject to a mortgage, and he become a party to an assignment of the mortgage, and by deed or covenant contract with the assignee to pay the amount due, he does not thereby make

(a) 5 Mad. 96.

(b) 3 Mylne & K. 607.

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it his personal debt, as between his heir and executor: as between these parties, the mortgaged estate remains the primary fund for the payment of the mortgage debt, and the bond or covenant of the heir of the mortgagor is considered merely as an auxiliary security to the assignee."

The question then remains, whether the will of Henry George, Earl of Carnarvon, had the effect of making the mortgage debt his personal debt. The question is always one of intention, and whether the testator intended to increase his real estate at the expense of his personal estate; *Donisthorpe v. Porter*, (a) *The Earl of Oxford v. Lady Rodney*. (b) There being no equity between real and personal representatives, it lies on the plaintiffs to make out such an intention. It is true that Henry George, Earl of Carnarvon, gives all his real and "personal estate to the present Earl, [*218] "subject to the payment of his debts, and the fulfilment of all contracts and obligations;" but he had entered into no contract or obligation to pay the mortgage debt, but only to exonerate (as he was bound to do, having assets of the first testator for that purpose) the Blunsden estate. The testator had no intention of charging the whole of his estate with a debt, for which the estate of the first testator alone was liable.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS, after detailing the circumstances of the case, and the nature of the question between the parties, said he should postpone giving judgment until he had an opportunity of looking into the cases.

March 12.—THE MASTER OF THE ROLLS:—The principal question raised in this cause, is whether the devisees in trust of the Marston estate, under the codicil of Henry George, Earl of Carnarvon, are entitled to have a mortgage for 8000*l.* and upwards paid out of the personal estate of the same Earl.

The mortgage was created by, and was the personal debt of Henry, Earl of Carnarvon, the father of Henry George, and the money was secured by a term of 200 years, which comprised not only the Marston estate, but also another estate called Blunsden.

The two estates being subject to the mortgage, the Blunsden estate was devised by the will of Henry, Earl of Carnarvon, and under that will became vested in Augusta Elizabeth, the daughter of Charles Herbert; "the Marston estate descended on Henry George, Earl of Carnarvon, [*219] as the heir of his father; and he was also the executor and residuary legatee of his father.

Under these circumstances, the devisee of the Blunsden estate was entitled to have it exonerated from the mortgage, by payment out of the personal estate, or, if necessary, out of the descended real estates of Henry, Earl of Carnarvon; and Henry George, who was the executor, having personal as-

(a) Amb. 600.

(b) 14 Ves. 417

1839.—*The Earl of Ilchester v. The Earl of Carnarvon.*

sets, and also heir having real assets, was in those characters liable to pay the mortgage, as he was liable to be compelled to apply the assets which he had received for that purpose.[1]

He made his will, dated the 27th day of September, 1821, and thereby left his real and personal estates to his eldest son, the present Earl of Carnarvon, subject to the payment of his debts, the fulfilment of all contracts and obligations, payment of annuities with which he was chargeable, and to his funeral expenses; and on the 8th of May, 1824, on the occasion of the marriage of Augusta Elizabeth Herbert, who was entitled to the devised Blunsden estate, he covenanted for himself, his executors, administrators or assigns, in effect that he would exonerate the Blunsden estate from the mortgage to which it was subject, in common with the descended Marston estate.

At the time when he entered into this covenant, he might have been compelled to do that which he covenanted to do; he had personal estate of his father sufficient, and also descended real estate sufficient for the purpose. It may be assumed that, being, as residuary legatee, owner of the personal estate, and, as heir at law, owner of the descended real estate, it was [220] for his own convenience that he entered into this covenant, rather than apply his father's assets in payment.

Very soon after the date of this deed, and on the 10th of July, 1824, he executed a codicil to his will, and thereby devised the Marston estate. The codicil does not mention the mortgage to which the Marston estate was subject, but provides that, in case it should happen by sale, mortgage, or other disposition of the estates thereby devised made in his lifetime, the same should be insufficient to provide for the annuity therein mentioned, the annuity was to abate in proportion.

On the 9th of July, 1830, a deed was executed between Thomas D'Oyley, in whom the mortgage term had become vested, of the first part; Henry George, Earl of Carnarvon, of the second part; Algernon Herbert, who was the person entitled to the money secured by the mortgage, of the third part; and Francis Newman Rogers, and George O. Lempriere, of the fourth part; and thereby, after reciting that Algernon Herbert was satisfied that the Marston estate was a full and ample security for the payment of the mortgage money, it was witnessed, that Thomas D'Oyley, at the request of Algernon Herbert, assigned the mortgage money and so much of the estates comprised in the mortgage term as constituted the Marston estate to Rogers and Lempriere, subject to the same equity of redemption as the same were subject to under the original mortgage deed.

The intended effect of this deed was, to charge the Marston estate exclusively with the mortgage; and in the execution of this intention no more was done than the owner of the Blunsden estate had a right to com-

[1] Vide *The Duke of Cumberland v. Codrington*, 3 Johns. Ch. Rep. 229, 257. *Knight v. Davis*, 3 Myl. & K. 361.

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pel Henry George, Earl of Carnarvon, to do; although the *mort- [*221]
gage extended over the two estates, yet, as between the owners of
the two estates, the owner of the equity of redemption of Blunsden, a speci-
fic devisee, had a right to throw the whole burden on the owner of the
equity of redemption of Marston, who was the heir taking by descent; and
here again it may be assumed, that Henry George, Earl of Carnarvon, being
owner of the personal estate, and of the descended real estate, both of which
were applicable to the payment of the mortgage, made an exclusive charge
on the descended real estate for his own convenience.

Henry George, Earl of Carnarvon, died in the year 1833; and the ques-
tion is, whether, under the circumstances which have been stated, his per-
sonal estate, or the Marston estate devised by his codicil, is the primary fund
for payment of the mortgage.

In the consideration of the question, it must be observed, that in some
respects, Henry, Earl of Carnarvon, owed a like duty to the mortgagee
and to the owner of the Blunsden estate; the mortgagee, for the purpose of
obtaining payment, and the owner of the Blunsden estate, for the purpose of
obtaining exoneration, had each of them a right to resort to the personal
estate, and to the descended real estates of Henry, Earl of Carnarvon; and
Henry George, Earl of Carnarvon, had corresponding duties towards both;
and, having regard to this circumstance, I think that the case of *Scott v.*
Beecher distinctly applies; and it follows that the mere circumstance of
Henry George being the owner of the personal estate, which in his hands
was the primary fund, and also of the descended real estate, which in his
hands was the secondary fund for payment, is not a reason, why, as between
those who are entitled to his personal estate and those who are enti-
tled to the devised *mortgaged estate, the latter should be relieved; [1] [*222]
and this brings us to the question, whether the acts done afford indi-
cations of an intention either to adopt the mortgage debt as a personal debt
of his own, or to have it paid out of his own personal estate after his death.

It has been determined, that when the mortgage debt is created by another,
the estate must bear the burden, although the owner of the equity of redemp-
tion has charged other parts of his property with the payment of all his
debts; [2] and it does not appear to me that the covenant contained in

[1] The mere charging of a secondary fund with the payment of debts, does not exempt the
primary fund, or postpone its application, unless the intention of the testator to exonerate it for the
benefit of the legatee, or some other person is manifest. *Hawley v. James*, 5 Paige, 319, 469.

[2] Where a person takes a conveyance of land subject to a mortgage, covenanting to indemnify
the grantor against the mortgage, and dies intestate, the land is the primary fund to be resorted to
for the payment of the residue, and the heir cannot throw the charge upon the personal represen-
tatives. And if the purchaser has even rendered himself liable, at law, for the payment of the
debt, this circumstance will not alone be sufficient to shift the charge upon the personalty. He may
by express direction, or necessary implication shift the charge from the realty to the personalty;
but, if having subjected his personal estate to the charge, he dies, and the land descends to his
heir, who is also his personal representative; although the personal funds of the ancestor, in the

1839.—Winchelsea v. Garrety.

the settlement of 1824, and the execution of the deed of July, 1830, amount to an adoption of the debt personally, or give an equity to the devisee to have the estate exonerated.

It is true, that Henry George, Earl of Carnarvon, could not apply his father's personal estate, of which he was residuary legatee, and which was more than sufficient to pay all the debts, to his own use, without making himself, in one sense, personally liable to pay the mortgage; but he might do this, in the reliance, which would have been well founded, that the descended Marston estate was sufficient for his indemnity, and for the satisfaction of the mortgage; and when the charge was brought to rest on the Marston estate exclusively, he seems to have been careful to subject himself to no personal liability to the mortgagee. The transaction appears to have been for the purpose of, what has been called, accommodating the charge, and not for the purpose of making the debt his own. What he might have done if he had been aware of the question which would arise, can only be conjectured; but, under the circumstances as they now appear, I think that the devisees in trust of the Marston estate take it *cum onere*, and are not entitled to have the testator's personal estate applied in satisfaction of the charge.[1]

[*223]

*WINCHELSEA v. GARRETY.

1839: March 21.

The stop order can only be granted either on an admission or proof of the incumbrance; and will not be granted "without prejudice to the validity of the charge."

MR. PARRY appeared in support of a petition for the common stop order, to prevent the payment of a fund out of court without notice to an incumbrancer thereon; but he was not prepared with the necessary proof of the deed creating the incumbrance.

MR. KINDERSLEY, for the party to the cause entitled to the fund, declined admitting the deed; but he consented to the order being granted without prejudice to any question as to the validity of the incumbrance.

hands of the heir, were liable for the debts, yet on the death of the heir, his personal assets are not the primary fund for payment. *Duke of Cumberland v. Codrington*, 3 Johns. Ch. Rep. 229.

[1] The leading principles upon which the above case turns, are ably considered by Kent, Ch. in the case of *The Duke of Cumberland v. Codrington*, 3 Johns. Ch. Rep. 229. A person mortgages an estate, and by his will, after directing payment of his debts, devises all his residuary real estate, including the mortgaged estate, and all his residuary personal estate to his eldest son, whom he appoints his executor. The son proves the will, and dies intestate, without having paid off the mortgage. Both father and son leave sufficient personal assets to pay it off. Knight Bruce, V. C. decreed, on the authority of modern cases, but reluctantly, and against the opinion which independently of them he would have entertained, that as between the heir and administrator of the son, the mortgaged estate is the primary fund for payment of the mortgage. *The Earl of Clarendon v. Barham*, 1 Yo. & Coll. C. C. 688. See further, 3 Myl. & Cr. 772, n. 1. Revised Statutes of N. Y. vol. 1, (2d ed.) p. 740, § 4, cited 1 Russ. & M. 633, n. 1.

1839.—Watts v. Scrivens.

THE MASTER OF THE ROLLS said he could not grant the stop order, except upon the admission of the title, or proof of the deed, as it might be admitting into the proceedings a perfect stranger to the cause.(a)

WATTS v. SCRIVENS.

1839 : March 19, June 4.

A testatrix directed funds to be transferred in the bank books, into the names of A. B. and wife, and their children who were infants, for the benefit of A. B. and wife for life, with remainder to their children ; this was done, and a suit being instituted for the performance of the trusts : Held, that the court had no jurisdiction under the 1 W. 4, c. 60, to order the infants to transfer the fund into court.

IN this case the testatrix directed her executor, George Scrivens, to pay and transfer the sum of 100*l.* per annum, long annuities in the books of the Governor and Company of the Bank of England, into the joint names *of the plaintiff, Stephen Watts the elder, and Caroline his [*224] wife, and Stephen Watts the younger, and all other the child and children of the plaintiff and Caroline his wife, who should be living at her, the said testatrix's, decease, to and for the use and benefit of said Caroline Watts and Stephen Watts the elder, during their lives and the life of the survivor of them ; and from and after the decease of the survivor of them, then to and for the use and benefit of all and every the child and children of said Caroline Watts, in equal proportions, share and share alike.

In pursuance of the direction to that effect, contained in the will of the testatrix, George Scrivens, the executor, out of the assets of the testatrix, transferred the sum of 90*l.* per annum long annuities, having deducted the sum of 10*l.* per annum from the sum of 100*l.* by the will of the testatrix directed to be invested in the said annuities, for the purpose of paying the legacy duty thereon ; and which annuities stood in the joint names of the plaintiff, Stephen Watts the elder, and Caroline his wife, Stephen Watts the younger, Edward Andrews Watts, Jeremiah Alfred Watts and Charles Henry Watts, in the bank books.

The children were infants.

The bill prayed that the trusts of this sum of 90*l.* long annuities might be carried into execution, and that the fund might be brought into court and secured for the benefit of the parties interested therein. The children being all infants, the question raised at the hearing, was whether under the 1 W. 4, c. 60, the court could order the infants to join in transferring the fund into court.

The case stood over.

*June 4.—Mr. Willcock, for the plaintiff, now relied on a case of [*225]

(a) The proper proofs were afterwards produced.

 1839.—*Re Gornall*.

Kidd v. Kidd,^(a) and stated that it would be very inconvenient to the tenant for life, who was going abroad, that the fund should continue in the names of several parties, some of whom were infants; for in such case it would be impossible to give a power of attorney for receiving the dividends in his absence, the Bank requiring all the parties to join therein; [*226] that the plaintiff, who was desirous of *raising money for his present purposes, was unable to do so in consequence of that difficulty, and of the power which all the other persons in whose names the fund had stood, of receiving individually the dividends when due, and that without the concurrence of the others. He contended that the interest of all parties would be best consulted by having the fund brought into court.

Mr. Heathfield for the executor.

THE MASTER OF THE ROLLS said that he was willing to aid the plaintiff, but he thought he had no jurisdiction, and that the case cited did not apply.

RE GORNALL.

1839: May 22.

Exceptions for scandal and impertinence, taken on summary proceedings upon petition, should where there is no clerk in court, be served on the solicitor.

In this case the proceedings were summary, upon petition, and not in a cause, and the affidavit in support of the petition had been referred for scandal

(a) *KIDD V. KIDD*.

M. R. 1832: July 26, November 23. 1833: June 3.

The facts of this case, as appearing from the papers in the cause, were as follows:—James Kidd died intestate in 1822, leaving Mary Elizabeth Kidd his widow, and Caroline Kidd an infant, his only child and next of kin him surviving. Letters of administration were afterwards granted to the widow. The original bill was filed in 1831 by the widow, stating that the testator was entitled, amongst other property, to a certain sum of money in the funds, and that all his debts were paid, and that the residue of his personal estate consisted of three several sums of stock, of which the widow alleged she was entitled to one-third, and the infant to two-thirds; that in 1823 the administratrix had transferred the three sums into the joint names of herself and her infant daughter, which, it was alleged, was made by mistake, and without considering what the effect would be; that the widow's one-third could not be transferred until her daughter attained twenty-one. The bill prayed, that the Bank might be decreed to permit the widow and infant to transfer, and that the infant might be decreed to join the widow in transferring, one-third of the stock into the name of a person to whom the widow had granted an annuity secured upon the fund. By the decree, it was declared that the infant was a trustee as to one-third of the stock, and she was ordered and decreed, according to the provisions of the 1 W. 4, c. 60, to join the widow in transferring one-third of the fund into the names of the widow and her incumbrancers: and it was ordered that the Bank should permit such transfer. (*)

(*) It appeared there were great irregularities in the suit, and that the decree had been made without evidence of the facts; and, upon a subsequent application, made upon the part of the infant, the funds were directed to be retransferred, and the bill was dismissed.

 1839.—*Heighington v. Grant.*

and impertinence; and the question was, on whom the exceptions should be served, there being no clerk in court.

By the eleventh general order of 1828, it is ordered, "That no order shall be made for referring any pleading or other matter depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent, nor unless such order be obtained within six days after the delivery of such exceptions."

"The usual practice is to leave the exceptions with the clerk [*227] in court of the parties excepting, who hands them over to the clerk in court of the opposite party, and this is termed delivering the exceptions.

There being no clerk in court, a difficulty arose on the part of the secretary of the Master of the Rolls in drawing up the order of course, referring the exceptions to the Master.

Mr. *Booth*, on behalf of the petitioner, now applied to the court, and proposed that the exceptions should be delivered to the solicitor of the petitioner.

THE MASTER OF THE ROLLS considered that to be the proper course.

ROBINS v. MILLS.

1839: March 21.

As application in a cause, by a client, to tax a solicitor's bill, is not within the general orders of May, 1837.

THE question in this case was, whether the general orders of the 5th of May, 1837, (a) applied to an application for the taxation of a solicitor's bill of costs, so that the order was to be made by that branch of the court where the cause had been heard.

THE MASTER OF THE ROLLS said that this case was neither within the spirit nor within the meaning of these orders.

*HEIGHINGTON v. GRANT.

[*228]

1839: March 21, April 26.

A suit was instituted for the administration of an estate, and to charge an executor with interest on balances retained in his hands; the decree directed a taxation of the costs of so much of the suit as sought to charge interest: Held, that this comprised not only the excess of costs incurred by the question of interest, but also an apportionment of the general costs of the suit.

Mode of taxation of bill of costs where an apportionment is directed.

THIS was a petition for leave to file exceptions to the Master's taxation and

(a) 1 Keen, ix. 2 Mylne & Cr. App. 1.

 1839.—*Heighington v. Grant.*

certificate of costs, on the ground that the Master had proceeded upon a mistaken principle in the taxation which he had made.

The bill prayed that the trusts of the will of Robert Heighington might be established, that an account might be taken of his personal estate and of his debts and funeral and testamentary expenses, and that the clear residue of his estate might be ascertained; and that the defendant, John Grant, the petitioner, might be charged with interest upon such balances as should from time to time appear to have been in his hands.

The decree, besides directing the usual accounts to be taken, ordered the Master to ascertain what balances had remained in the hands of the defendant Grant at the end of each year, since the end of one year after the testator's death, and to compute interest on such balances; and then referred it to the Master *to tax the plaintiffs their costs, as to so much of the suit as sought to charge Mr. Grant with interest on those balances.*

The Master certified, that it being directed by the decree, that he should tax the plaintiffs their costs as to so much of this suit as sought to charge the defendant with interest on the balances, from time to time remaining in his hands as aforesaid, he had proceeded to tax the same; and that the bill of such costs, amounting to the sum of 366*l.* 2*d.* 10*s.*, having been laid

before him, he had taxed the same at the sum of 130*l.* 11*s.* 6*d.*
 [*229] including therein a sum of 1*l.* 2*s.* 2*d.*, the expenses of a *subpœna* for the said costs.

The petitioner complained, first, that the Master had apportioned "against him, one equal half part or some other definite proportion of certain costs, which would have been incurred whether the suit had sought to charge the petitioner with interest on the balances in his hands or not; and thereby and otherwise the Master had taxed and allowed to the plaintiffs, as against the petitioner, divers costs or sums of money, over and above the costs of so much of the said suit as sought to charge the petitioner with interest as aforesaid."

Secondly, that the Master "had apportioned and charged, as against the petitioner, one equal half part, or some other definite proportion of certain costs, without reference to the actual proportion of such costs occasioned by the suit seeking to charge the petitioner with the interest on balances; and thereby the Master had taxed and allowed the plaintiffs, as against the petitioner, divers costs or sums of money more than the costs of so much of the suit as sought to charge the petitioner as aforesaid."

Thirdly, that the Master had charged the petitioner with the costs of a motion for the payment of a certain sum of money into court.

The petition set forth, at length, the items of which the costs so taxed, apportioned and charged against the petitioner consisted, as "Instructions for bill, 6*s.* 8*d.*; attending counsel, 3*s.* 4*d.*," &c.

Mr. Pemberton and Mr. Lloyd, in support of the petition, con-
 [*230] tended that the costs had been taxed on an "erroneous principle;

1839.—*Heighington v. Grant.*

that the objects of the bill having been determined to be two, and the petitioner had been exclusively charged with a fixed arbitrary proportion for the costs relating to the interest, and also with half of the general costs of the suit, which would have been equally occasioned if the question of interest had never been raised.

Mr. G. Richards and *Mr. W. C. L. Keene*, contra, contended, that by the long established practice in the Master's office, where the court directs the taxation of the costs of one of the several objects of a suit, it is understood to carry, not only the costs of so much of the suit as relates exclusively to that particular object, but also a portion of every general proceeding in the suit; and that if the court had intended that the extra costs occasioned by the question of interest should be ascertained, it would have directed the taxation in other words, limiting the taxation to such extra costs only. 2 *Smith's Pr.* 640, 2d edit., where it is stated, that the order giving to a party a portion only of the costs of suit may be framed in two ways: in one way it may be so expressed as to involve an apportionment of the whole of the general charges; in the other way it may be expressed so that the exception shall only extend to the excess of expense incurred in consequence of the excepted matter. The author then gives the following illustration:—"Suppose a bill filed for tithes of three titheable articles, and the court, as to one of them (say milk,) decides against the plaintiff, and gives him the costs of the suit, except so much as relates to the tithes of milk;" at first sight it appears, that when you have taken away the excess of expense occasioned by the claim for tithes of milk, the whole of the other costs ought to be paid; but the law on the subject is, that inasmuch as the tithes of milk was a [*231] substantive claim, it must bear its due proportion of the general charges of the suit: for although, if the bill was confined to one object, most of the general charges would be the same as if filed for ten objects, yet a party having one sure ground of suit shall not be allowed to bring forward nine other claims without any risk of costs. In the supposed case, the question as to the tithes of milk might have formed a distinct subject for a suit, but the party united it with two other claims: it is reasonable, that as the question of the milk had the full benefit of the suit, it should bear its proportion of the general expense."

Mr. Pemberton, in reply.

April 26.—THE MASTER OF THE ROLLS:—Since the petition was heard, I have inspected the bill of costs, and have received a certificate stating the particular mode in which the taxation was conducted; (a) *and it [*232]

(a) To the Right Hon. the Master of the Rolls.

My Lord:—I beg most respectfully to certify to your Lordship, that in taxing and apportioning the costs in the above cause, in pursuance of the decree, the following mode of ascertaining the amount of "so much of the plaintiff's costs of the suit as seeks to charge the defendant John Grant with interest on the balances from time to time remaining in his hands," was pursued:—The bill

1838.—*Heighington v. Grant.*

appears, that in the taxation, after all costs charged had been reduced to costs between party and party, the number of objects sought by the

was first taxed, disallowing all costs that were not strictly costs as between party and party; the number of objects which the bill sought, was then taken into consideration, and decided to be substantially two: namely, an account of the testator's personal estate, and the payment of interest on the balance from time to time in the hands of the defendant. The bill was then read through, line by line, by the respective clerks in court, in the presence of the solicitors, and, after considerable discussion, it was agreed, that of 72 folios of which the bill consisted, 52½ related generally to both the objects of the suit, 9 solely to the question of interest, and 10½ to the question of the account, which, being apportioned according to the practice, gave the following results; of the general 52½, 26½ were added to the 9 folios relating to the question of interest, and 26½ to the 10½ folios having no such relation, giving, of the whole 72 folios, 35½ to the object of interest, and 36½ to that of the account,—proportions sufficiently near one-half, to justify the agreement between the clerks in court to adopt that rule as to the bill and the general fees connected with it. This apportionment runs through Michaelmas term 1830, and Hilary term 1831.

The answer being subjected to the same investigation, showed the following result: of 78 folios, its total length, 39½ related generally to both objects, 18½ to the object of interest, and 20½ to the other object; 19½, therefore, of the general folios, being added to the 18½ relating to the object of interest, and 19½ (the other half of the general folios) to the other object, the folios stood: 57½ to the object of interest, and 40½ to the account; being again nearly one half to each object: and the costs of the answer, and the term fee of Easter term 1831, in which term it was filed, were divided in half.

In the same term a motion, by the plaintiff, for the defendant John Grant to pay into court the amount of moneys admitted by his answer to be in his hands, related wholly to the object of account, and did not touch the question of interest; no part, therefore, of the costs of such motion were charged against the defendant.

In Trinity term 1831, the plaintiff obtained an order to amend, and amended his bill accordingly by 41 additional folios; 30 folios, or three-fourths of which amendments, relate to the question of interest, and the costs are apportioned accordingly; charging the defendant with the proportion of three-fourths of the costs of that proceeding.

In Michaelmas term 1831, the defendant put in his answer to the amended bill, containing 35 folios, 25½ of which relate to the question of interest; and the defendant is charged with that proportion of the office copy of the said answer.

In the next charge of abbreviating the pleadings, the defendant is specifically charged with the number of folios ascertained, as before, to apply to the question of interest.

In Michaelmas term 1831, and Hilary term 1832, the costs of replication rules, and going into evidence, applying only to the question of interest, are wholly charged against the defendant.

The costs of setting down the cause and the other general fees, up to and including the hearing, are apportioned by the general amount of the folios of the pleadings, including the depositions; giving, of the total 299 folios, 203 to the question of interest—a proportion so near two-thirds as to induce the adoption of that rate of apportionment from Easter term 1822 to Trinity term 1832.

After the decree, the costs are apportioned according to the two objects of inquiry directed thereby; when both are in progress, the attendance and term fees are halved; if any proceeding related to one object only, the costs are wholly allowed, or wholly struck off, according to circumstances: the proceedings in the Master's office embrace a period from Michaelmas term 1832 to Michaelmas term 1838.

During the progress of the suit in the Master's office, two bills of revivor became necessary, one on the death of a plaintiff, the other on the marriage of one of the female plaintiffs; and, as the revival of the suit was necessary for both purposes, the costs thereof are divided in halves.

Apart from the question of apportionment, the petition presented by the defendant John Grant seeks to show that he has been improperly charged with the cost of a motion, made by him, to pay a sum of 91*l.* 15*s.* 11*d.* into court.

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bill was considered and held to be substantially two : the account of [*233] the personal estate and the payment of interest on balances : and that upon a minute examination of the bill, it appeared that nine [*234] folios related exclusively to the object of interest, ten and a half exclusively to the object of account, and fifty-two and a half folios generally to both objects of the suit ; and this computation left the number of folios, and the costs relating to the two objects, so nearly equal, that the clerks in court agreed so to consider them.

A similar process was applied to the amended bill, and left a proportion of three-fourths for the costs as to the interest, and one-fourth only for the costs of the account : and in the subsequent proceedings the costs were apportioned exclusively to one object or the other, according to the amount actually incurred, on the same principle ; and the motion for payment of money into court related exclusively to the interest.

The petitioner is wholly inaccurate in representing that he was charged arbitrarily with a definite proportion of costs, without reference to the actual costs occasioned : this was not the case—the proportion was [*235] determined by the amount of costs computed to be actually occasioned. I think that in this case, the petitioner was justly charged with a proportion of the costs of the suit which might have been incurred, even if the bill had not sought to charge him with interest on balances, because, in fact, the same points of the bill were required to sustain the charge for interest.

Mr. Mills, one of the clerks in court who assisted in the taxation, has certified to me the mode in which the taxation was conducted ; Mr. Smith, the other clerk in court who assisted in the taxation, has excused himself from

With regard to this part of the taxation, I take the liberty of certifying, that the motion related wholly to the question of interest, the above sum being the defendant's own calculation of the amount of interest in his hands ; and as no reservation of the costs could be found in the minutes, (no order being ever drawn up,) it appeared that he ought to be charged with the costs of this proceeding : indeed, little or no opposition was offered thereto. I have the honor to be, my Lord, your Lordship's very obedient servant.

Richard Mills.

Six Clerks office, April 4, 1839.

To the Right Hon. the Master of the Rolls.

We the undersigned clerks in court beg to certify, that (assuming the details to be correct) the apportionment of costs in the annexed certificate of Mr. Mills, has been made according to the rules which have been adopted, where decrees or orders direct the Master to tax so much of the costs of a suit as relate to a particular object of the suit, or where the words of the decree or order, in any way render an apportionment of the costs of the suit necessary.

S. H. Lewin.

George Gatty

James Thomas Horne.

John Wainwright.

W. R. Baines.

Oswald Milne.

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giving a certificate; but I have received from several other clerks in court certificates that, if the facts be as stated, (which there is no reason to doubt,) the taxation has been conducted according to the practice.

I am therefore of opinion that the petitioner has wholly failed to make out his case, and that the petition must be dismissed with costs.[1]

 ELAND v. ELAND.

1838: July 12, 20, November 16, December 19.

The testator, having charged his real estate with his debts and legacies, devised it to his eldest son A. B. in fee, and appointed him executor. A. B. mortgaged the estate, and covenanted against all incumbrances, except the legacies: Held, first, that the mortgagee took for his security the estate, minus the amount of legacies; and secondly that the unpaid debtors of the testator were entitled to the fund reserved in the mortgage deed for legacies, in priority of the legatees.

A. B., the executor and also devisee of real estate subject to debts and legacies, mortgaged it, first, to C. D. subject to the legacies, and afterwards to E. F. subject to the mortgage to C. D.: Held, that E. F., taking with notice of C. D.'s mortgage, took subject to the legacies.

THE testator, Thomas Eland, by his will dated in June, 1817, after directing all his just debts and funeral and testamentary expenses to be [*236] fully paid and *satisfied, and charging his real estate in aid of his personal estate with the payment thereof accordingly, gave and devised to his wife one annuity or clear yearly rent charge of 80*l.*, which he expressly charged upon his real estate at Metham thereafter devised, and he directed the same to be paid to her half-yearly, and the first payment thereof to commence upon the half-yearly day that should next happen after she should leave their children at Metham aforesaid, and go to live elsewhere; with powers of distress, entry and sale, in case the same should be in arrear. And the said testator gave to the plaintiff, his second son, Abraham Eland, the legacy or sum of 2000*l.*, and to his daughter Margaret the legacy or sum of 600*l.*, to be paid to them respectively when and as they should attain their respective ages of twenty-one years: and subject to the payment of the said rent charge and the several legacies thereinbefore bequeathed, the testator gave, devised and bequeathed his messuage, &c., and hereditaments at Metham, and his personal estate, unto his son Thomas Eland, his heirs, executors, administrators and assigns, and he appointed him executor.

By a codicil to his will, dated in December, 1816, the testator gave a legacy of 500*l.* to his daughter Mary.

The testator died in 1817, leaving Thomas Eland his eldest son and heir at law, who proved his will and entered into possession of his property.

The testator's daughter Mary died an infant shortly after the testator's death, namely, in August, 1817; Margaret attained her age of twenty-one

[1] Affirmed by the Lord Chancellor, 24th December, 1839.

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years in December, 1829, and married Nicholas Blanshard ; and Abraham attained his age of twenty-one years in 1832, *at which [*237] respective times their legacies became payable.

In April, 1826, while all the legatees were infants, by indentures of lease and release, dated the 5th and 6th of April, 1826, made between Thomas Eland, therein described as "the eldest son and heir at law and devisee in fee, named in the last will and testament of Thomas Eland deceased," of the one part, and Mary Dunn Crooke of the other part, after reciting that Thomas Eland had occasion to borrow 1000*l.*, which Mary D. Crooke had agreed to lend, he, Thomas Eland, mortgaged the property devised by the testator, to Mrs. Crooke in fee, for securing the 1000*l.* and interest ; and he covenanted against incumbrances, "save and except the legacies given and bequeathed by the said will of the said Thomas Eland deceased to Abraham Eland, Margaret Eland and Mary Eland," payable to them when they should attain twenty-one, "and save also and except an annuity of 80*l.* to Mary Eland, the mother of the said Thomas Eland, given and devised by the said will of Thomas Eland, deceased."

By indentures of lease and release, dated the 9th and 10th of May, 1826, Thomas Eland mortgaged the property to a Mrs. Seaman in fee, to secure 500*l.* and interest ; and the deed contained the following clause :—"And it is hereby declared that the hereditaments and premises hereby granted and released, or intended so to be, are already mortgaged to Mary Dunn Crooke, by indentures of lease and release bearing date respectively the 5th and 6th April last, and both made or expressed to be made between the said Thomas Eland, party hereto, of the one part, and said M. D. Crooke, of the other part, for the sum of 1000*l.* and interest."

*By another indenture, dated the 27th of April, 1830, made between [*238] Thomas Eland, of the first part, Mrs. Crooke, of the second part, and Nicholas Blanshard, (who had married the testator's daughter Margaret,) of the third part, after reciting the indentures of the 5th and 6th of April, 1826, and that Thomas Eland had applied to Mrs. Crooke to lend him 500*l.*, Thomas Eland covenanted that the property should remain as a security for the 500*l.* ; and reciting the bequest, by the will and codicil of the testator, of 600*l.* to his daughter Margaret, with which he had incumbered his hereditaments at Metham ; and reciting that, on the day of the date thereof, Thomas Eland had paid unto Nicholas Blanshard the said legacy of 500*l.*,—Blanshard and Thomas Eland joined in releasing the property from the legacy of 500*l.*

By the death of the testator's daughter Mary, Nicholas Blanshard, in right of his wife, became entitled to one-third part of her legacy, and the plaintiff Abraham Eland, who at that time was under twenty-one, also became entitled to another third ; and by an indenture of the 27th of April, 1831, made between Thomas Eland of the first part, Mrs. Crooke of the second part, and Nicholas Blanshard of the third part, after reciting the indenture of the 27th of April, 1830, in consideration of a further sum of 350*l.*, Thomas Eland ex-

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executed a further charge upon the property for securing that sum ; and reciting the legacy to Mary, and that by her death Nicholas Blanshard, in right of his wife, became entitled to one-third of her legacy of 500*l.* ; and also reciting that, on the day of the date of the said indenture of the 27th day of April, 1831, Thomas Eland had paid unto Nicholas Blanshard, 166*l.* 13*s.* 4*d.*, so due to Margaret Blanshard, and that Nicholas Blanshard had agreed [*239] to release and discharge the real estate of the *testator Thomas Eland, therein before mentioned and described, from payment of 166*l.* 13*s.* 4*d.*, it was witnessed that Nicholas Blanshard released the property from the 166*l.* 13*s.* 4*d.*

By a similar deed, dated the 27th of April, 1832, Thomas Eland executed a further charge to Mrs. Crooke for the sum of 150*l.* ; and Abraham Eland, who had attained twenty-one, released the property from his 166*l.* 13*s.* 4*d.*, being one-third of Mary's legacy, to which he had become entitled.

The legacy of 2000*l.* to which the plaintiff, Abraham Eland, was entitled, being unpaid, he filed this bill to compel payment.

By the original decree it was referred to the Master to take the usual accounts.

The Master reported that, as to the personal estate of the testator, "it being alleged on the part of the defendant, Thomas Eland, that he was utterly incapable of making out such accounts, the several other parties had waived the taking such accounts ;" and he found that the only creditor of the deceased was Robert Eland, for a debt due on bond and for interest, which amounted to 569*l.* 6*s.* ; and he found that the legacy of 2000*l.* was due to Abraham Eland, with interest, amounting together to 2320*l.* 18*s.* 4*d.* ; and he found that the annuity to the widow commenced in March, 1831 ; and he found that the testator's property had sold for 5050*l.*

The real estate was insufficient to pay the debt and legacies of the testator, and the mortgages.

[*240] *Mr. *Temple* and Mr. *Roupell*, for the plaintiff, the legatee, contended that the mortgagees took the estate expressly subject to the legacies, and that the amount thus reserved was payable to the legatees in priority to the creditors, or if not, then that the mortgagees took the real estate subject to the debts also.

They argued, that as to Mrs. Crooke, the contract between her and the executor was, that the mortgagee, Mrs. Crooke, should take as her security, the interest in the estate which might remain after satisfaction of the legacies charged upon it ; and as to Mrs. Seaman, that she took with notice of and subject to the prior incumbrance ; that she was therefore entitled to so much as remained after the prior mortgage had been satisfied, or, in other words, took subject to the legacies ; that the amount of the legacies thus having priority over all the mortgages, was payable to the legatees, whose specific rights had been reserved by the stipulation of the deeds, and that the creditors of the testator were not entitled thereto.

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They admitted the rule to be, that where there is a charge of debts, the generality of the trust relieves a party from the necessity of seeing to the application of the purchase money; but they contended, that a purchaser or mortgagee, in order to bring himself within the rule, must show that the trustee was selling the estate in that character, and not as owner—that he was carrying the trusts of the will into execution, and not dealing with the estate for his own benefit.

In *Watkins v. Cheek*,^(a) a purchaser was held bound to see to the application of the purchase money, although there was a general charge of debts, because the deed "showed that the money advanced to [*241] Cheek "was a mere personal loan to him, having no color of connection with the charges on the testator's estate;" so here, the recital in the first deed is, "that Thomas Eland had occasion to borrow 1000*l*." &c. showing that he was dealing as the owner for his own benefit, and not in the performance of the trusts of the will; that this was one of the grounds of the decision of the Vice-Chancellor in *Johnson v. Kennett*,^(b) and which did not appear to have been interfered with by Lord Lyndhurst on the reversal.^(c)

Mr. *Sutton Sharpe*, for the widow, contended that she had a right to elect between the annuity and her dower.

Mr. *Richards*, for Mrs. Croke, the mortgagee, contended that she had priority both over the debts and the legacies, or, at all events, over the debts; that the effect of the transactions was not such as to deprive her of the acknowledged rule, "that where debts are charged generally, or where debts and legacies are charged generally, the purchasers of the real estate are not bound to see to the application of the purchase money." *Johnson v. Kennett*; ^(d) that the money had been paid into the only hand competent to receive and to distribute it; that there was no evidence that the money was not raised for the purpose of paying the debts, or that it was not so applied; and that the mortgagee was therefore protected against any claim, on the part of the creditors at least. As regarded the legatees, he contended that, by the terms of the deed, the mortgagee did not, as was supposed, take subject to the legacies and that the covenant against all incumbrances, except "the legacies had not the effect of postponing the security to the [*242] legacies.

That *Watkins v. Cheek* did not apply, being a case where two parties concurred in committing a breach of trust.

Mr. *Purvis*, for Mrs. Seaman, in addition to the arguments offered on the part of the other mortgagee, contended that their cases differed, for that the mortgage deed of Mrs. Seaman contained no such exception as to the legacies as was contained in the mortgage to Mrs. Croke; and that the notice of

(a) 2 Sm. & Stu. 199. (b) 6 Simons, 390. (c) 3 Mylne & K. 624. (d) 3 Mylne & K. 630.

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Mrs. Crooke's charge contained in Mrs. Seaman's deed did not operate so as to postpone Mrs. Seaman to the legatees ;(a) *Wyatt v. Barwell*.(b)

Mr. *Pemberton*, for the creditor :—The parties have waived the accounts of the personal estate ; it must therefore be assumed that it was sufficient to pay the creditors ; as to the general rule, as to seeing to the application of the purchase money, there is no doubt ; if money is taken up by the trustee for his own purposes, the mortgagee or purchaser takes subject to the charges.

Here, the mortgagees have expressly taken subject to the legacies ; they must therefore have known that the money was not raised for the purpose of paying the debts ; for then they would have taken, not *subject* to, but in priority of the legacies. This, with the recital as to the loan, shows that the devisee raised the money for his own purposes, and not for the pay-
[*243] ment of the *testator's debts ; the mortgagee therefore took subject to the trusts of the will, and became bound to see to the application of the mortgage money.

The claims of the legatees to be paid in priority to the creditors cannot be maintained, for they were no parties to the contracts reserving the legacies ; when the amount comes into the hands of the executor it constitutes part of the testator's assets and must be dealt with by him in the usual course of administration : the testator's debts must in that case be first satisfied, before the legatees are entitled to any thing.

Mr. *Lowndes*, for Thomas Eland.

Mr. *Temple*, in reply.

July 12.—THE MASTER OF THE ROLLS :—The general rule on which the court acts in cases of this kind, has been very accurately stated at the bar ; but this case must be decided on the peculiar facts and circumstances, which are different from those which occurred in the cases cited.

By the will of this testator, he subjected all his estates to the payment of his debts, he gave certain legacies, and then, subject to the legacies, he gave the real estate to Thomas Eland. Thomas Eland was trustee and executor of the will, and is a devisee of this estate, and, no doubt, he was the person by whom the assets of the testator ought to have been applied in satisfaction of all the debts and legacies. And if he had sold the estate in the
[*244] ordinary way, and received the purchase *money, even if he had misapplied that purchase money, his vendees would not have been bound to see to the application of it, and would have held the estate notwithstanding that the debts and legacies had not been paid.[1] But he does not

(a) Sugden's Vendors, ch. xvii.

(b) 19 Ves. 435.

[1] When a vendee, or other person, paying money to one acting in a fiduciary capacity, is bound to see the due application of it, see this case, on appeal, 4 Myl. & Cr. 420. *Wormley v. Wormley*, 8 Wheat. 421. *Ball v. Harris*, 4 Myl. & Cr. 266, 267. *Wood v. White*, id. 482.

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do that, what he does is to raise from Mrs. Crooke 1000*l*. [His Lordship stated the deeds of 5th and 6th of April, 1826.] Her security, as it appears to me on the construction of these deeds, consisted of the estate, less the amount of the charges referred to., [His Lordship stated the subsequent securities to Mrs. Crooke.] I should say, even if the words of the deed did not necessarily induce this construction, that the transactions which took place, show to demonstration, that this lady never imagined she had a security on anything, except only on the surplus after satisfaction of the charges. In other words, she took the estate, subject to the satisfaction of the amount of those charges; and it appears that two of the charges now remain, namely, the legacy of 2000*l*. to the plaintiff, and the annuity of 80*l*., which belongs to the widow, and which are both expressly stated in the deed.

With regard to the other mortgage which was made to Mrs. Seaman, dated the 9th of May, 1826, being about a month after the first deed was executed to Mrs. Crooke, it appears that Mrs. Seaman, who was a second mortgagee, had clearly notice of the first mortgage, because it was recited in her deed; [1] and I can hardly imagine that a second mortgagee upon an estate, with full notice of the first mortgage, could be considered in any other light than as a mortgagee of the equity of redemption, which remained in the mortgagor after the execution of the first mortgage. I do not see how it is possible to put it further; Mrs. Seaman had notice of the prior deed—she had the means of knowing what was the value of *the equity of redemp- [*245] tion—and she must be taken to have known it; and the security which she then took, was the equity of redemption vested in the mortgagor after the execution of the first mortgage. I, therefore, think Mrs. Seaman must be considered to have taken her security, subject to these charges.

The next is a question of considerable importance to the parties. It appears the debts have not been paid: there is at least a bond debt, to the amount of 500*l*. and upwards, which has not been paid. The question which arises is hardly this, whether the creditor unpaid is to remain unpaid, there being assets for the payment? but the question would seem to be, whether the amount of the unpaid charges, or that part of the estate which has been reserved by the mortgagor, ought to be considered as general assets, in which case the creditor would have to be paid out of the sum: or whether the amount of the debt is to be added, as against the mortgagees, to the amount of those reserved charges: that would seem to be the question. Now, I confess, I do not think it follows, that because the legatees may have remained unpaid at the time the mortgage was executed, it must therefore be inferred that the money

Sutherland v. Brush, 7 Johns. Ch. Rep. 21. *Field v. Schieffelin*, id. 153. *Page v. Adam*, 4 Beav. 269, 285. *Jones v. Price*, 11 Sim. 557, 562. 2 Sim. & Stu. 206, n. 1. 1 Keen, 578, n. 1. Revised Statutes of N. Y. vol. 1, p. 724, (2d ed.) § 66.

[1] A general recital in a deed that there were mortgages on the estate, was held to affect parties claiming under the deed, with notice of a mortgage not specified therein. *Farrow v. Rees*, 4 Beav. 18.

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was raised merely for the personal benefit of the mortgagor, and not for the purpose of paying the debts which were owing by the testator. I cannot comprehend why Thomas Eland, the devisee, supposing himself to be possessed of an estate which was sufficient, to pay both the debts which were payable immediately and the legacies which were payable at a future time, might not reasonably and properly have said, I will raise money to pay the debts now, and leave the legacies, which are payable hereafter, as charges on the estate. In that case the mortgagee would not have been obliged [*246] to "see to the application of the money. I am, therefore, very much disposed to think that I must look at the amount of the charges as general assets, that the creditors must be paid out of those charges, and that the remainder of those charges will belong to the legatees in priority to the mortgagee. If anything should ultimately remain, the mortgagee will obtain payment out of that. That seems to me the most reasonable construction I can give to the instruments, considering in that way, that the mortgagees properly paid the money to the trustees and executor, and that the security which they took, was the estate less the charges.

July 20. The case came on again, when *Mr. Sutton Sharpe* contended that the widow's annuity had priority of the plaintiff's legacy, she being a purchaser in consideration of her dower. He argued as follows:—

That in order to exclude a wife from dower, by election, it must be shown that the testator meant to exclude her from it.(a)

That the effect of putting a wife to her election, was to decide that the testator had given the benefit conferred by his will in bar of dower.

And where a bequest is made by a testator to his wife in lieu of dower, her election to accept the legacy placed her in the situation of a purchaser of what was given to her by the will; and she would then be entitled to [*247] a preference in payment over the other legacies; **Burridge v. Bradyl*,(b) *Blower v. Morret*,(c) *Davenhill v. Fletcher*,(d) *Heath v. Dendy*.(e)

That if the widow was not entitled to a priority, she was not to be held bound by her election, as she was not bound by an election made under a mistaken notion of the claim against her; *Wake v. Wake*,(g) *Kidney v. Coussmaker*,(h) *Edwards v. Morgan*.(i)

THE MASTER OF THE ROLLS (after reserving the question of election, and stating that he still considered that the security taken by the mortgagee was the value of the estate, minus the amount of the legacies, proceeded.) The controversy is first between the plaintiff, and unpaid legatee of 2000*l.*, and the mortgagee; the mortgagee insisting that, notwithstanding the words of the

(a) 2 Roper on Legacies, 540; and see *Roadley v. Dixon*, 3 Russ. 192. [200, n. 1.]

(b) 1 P. W. 127.

(c) 2 Ves. sen. 420.

(d) Ambler, 244.

(e) 1 Russ. 543.

(g) 1 Ves. jun. 335.

(h) 12 Ves. 136, 153.

(i) M'Clell. 548.

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deed, she is entitled to take the estate free from the charge; and the legatee insisting that he is entitled to the benefit of the charge expressly reserved out of the mortgage: and a further question arises between the legatee and a creditor. It appeared to me, however, on a former occasion, as it appears to me now, that there cannot be a competition between a legatee and a creditor; and this sum of 2000*l.*, being a portion of the testator's estate never assigned or distinctly appropriated to the legatee, although the legatee's name is mentioned in the deed, I cannot refuse to pay the debt out of this portion of the testator's estate.

In consequence of some of the parties having been taken by surprise, as to the questions raised, his Lordship permitted the case to be re-argued. [*248]

November 16.—The case was argued by the same counsel. (a)

THE MASTER OF THE ROLLS :—Upon the question, whether the mortgagees took their interest, subject or not subject to the payment of debts, I shall take an opportunity of again considering the matter, and again reading over the deeds which are material.

On the other questions which have been raised, I have only to state, that having carefully attended to the arguments to day, I can see no reason whatever to alter the opinion I expressed on a former occasion. Looking at these deeds, and the conduct of the mortgagor, who was the devisee, heir, executor and the person charged with the duty of paying the legacies, I am now of opinion, as I was before, that the mortgagee took, as his security for the money to be advanced, the mortgaged estate, minus, the value of the legacies, and that that was his contract. The other question discussed was, whether, in the absence of any other means of paying the creditor, the creditor had not a claim on the funds that were to be recovered by the executor and trustee of this mortgage. There was a contract, which as I conceive, amounted to this, that the mortgagor, for the purpose of paying the legacies, reserved, out of the mortgaged estate, the amount of the legacies then remaining unpaid. That amount must have come into his hands: being in his hands, was there such an appropriation, for the benefit of the legatees, as to prevent it, when in his hands, being treated as assets liable to the payment of [*249] the creditors; or are the creditors to go unpaid, in order that legatees and volunteers under the will may be paid, in consequence of the arrangement which was made by the executor in this case to reserve, out of the security, such a sum of money. Various difficulties have been presented, but I think every one of them is capable of an easy solution. It is not material to go into all these particulars, because still I think the creditors must be paid in priority to the legatees: there being assets for that purpose.

December 19.—**THE MASTER OF THE ROLLS** :—The question reserved in

(a) On this argument the widow's right to priority over the other legatees was conceded.

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this case was, whether the mortgagee was bound to see the money which she advanced on the mortgage, applied in satisfaction of the testator's debts. [His Lordship here detailed the circumstances of the case.]

The plaintiff's legacy of 2000*l.* being unpaid, this bill is filed to compel payment. On the inquiry under the decree, it appears that the bond debt remains unpaid. The account of the personal estate was waived, and the real estate is insufficient to pay the debt and legacies of the testator and the mortgages.

It is admitted, that as between the annuitant and the legatee, the annuitant is entitled to be preferred ;[1] but it is contended by the plaintiff, that the creditor and the legatees ought to have priority before the mortgagees ; and that at all events, the plaintiff, as legatee, and the widow, as annuitant under the will, are by the form and nature of the mortgage deeds, entitled to preference.

[*250] *On the other hand, the mortgagees insist that they fairly advanced the money to the devisee and executor, and were not bound to see to the application of it ; and that if not exempt from the legacies, they are exempt from the debt.

In the case of *Watkin v. Cheek*(a) it was determined, that if in a case of this sort, the circumstances of the transaction showed that the money was not to be applied in payment of the debts or legacies, the mortgagee must hold, liable to the charge.

Now the circumstances of this transaction do show that the first advance of 1000*l.* was not to be applied in payment of the legacies ; and, therefore, the mortgagee held subject to the legacies. It is argued, that the circumstances show, that the money was not to be applied in payment of debts. In the deed Thomas Eland is described as heir and devisee of the testator ; and it being recited, that he had occasion to borrow the money, and had requested the money to be lent to him, it is argued to be clear, that the whole transaction was by him, as owner of the estate and for his own benefit ; I am, however, of opinion that these circumstances do not lead to that conclusion : he was the person whose duty it was to raise and receive the money, and apply it for payment of the debts ; and I think that there is nothing in the deeds to show that the money was not to be duly applied, and the consequence appears to me to be, that the mortgagee holds, subject to the amount of the unpaid legacies and annuity, but not to the debt.

The amount of the unpaid legacy is reserved out of the security, [*251] and is recoverable by the executor and *mortgagor ; and coming to his hands as executor, I think that, however contrary to his intention at the time of the transaction, it is assets for the payment of the debt.

(a) 2 Sim. & St. 199. [Lord Cottenham admits the correctness of the principle upon which Sir John Leach proceeded in the case cited, but seems to question whether the facts in the case were strong enough to support the decision. *Eland v. Eland*, 5 Myl. & Cr. 427.]

[1] Vide 3 Russ. 200, n. 1.

 1839.—*Scoones v. Morrell.*

The plaintiff in this case appealed ; but the Lord Chancellor, on the 30th of May, 1839, dismissed the appeal with costs.[1]

SCOONES v. MORRELL.

1839 : March 8, 9.

Where strips of land lie between the highway and the adjoining enclosure, the legal presumption is, that the soil belongs to the owner of the adjoining old enclosure.

The fact of a title having been perfected in the Master's office, does not determine the question of the costs of a suit for specific performance, which depends upon whether the defects which have been removed there, were the occasion of the suit.

THE plaintiff, Mr. Scoones, was the trustee for sale under the will of a Mr. Redford ; and on the 10th of September, 1831, he entered into an agreement with the defendant, for the sale of an estate which had been devised to the plaintiff by the will of the testator, for the sum of 5300*l.* The contract contained certain special conditions ; the defendant was to pay for the timber, &c., at a valuation, and it was agreed that the purchase should be completed at Christmas, and "that the purchaser should be allowed to go into possession at Michaelmas if the title was then approved of ; but when the title was once approved and possession given, no objection should subsequently be raised to it, but the purchaser should be bound to complete the purchase at Christmas next."

The abstract of the title was delivered on the 18th of October, 1831, and the opinion of the defendant's counsel thereon obtained in the same month, approving of the title, subject to the indentifying the parcels, to an *objection as to an outstanding mortgage, and some few other minor [*252] particulars.

On the 17th of November, 1831, the defendant was let into possession of the principal part of the estate, and, in December following, a valuation of the timber was made by the appraisers of the respective parties.

In February, 1832, disputes arose between the parties on matters unconnected with the purchase, and on the 18th of that month the purchaser, in a letter to the vendor, stated, that he thought that it would be necessary,

[1] The case on appeal is reported 4 Myl. & Cr. 420, where Lord Cottenham observes that, "the course which has been adopted in the progress of the cause has given to this case an appearance of complexity that does not really belong to it." It was there held, that the mortgagee's title was complete, subject only to the amount of the legacies ; and therefore, that, after reserving the amount of the legacies, the mortgagee was entitled to the residue of the fund as a security for his debt, and that the amount so reserved was assets of the testator unadministered, and was therefore to be applied, first, in satisfaction of the debts, and then, so far as it would extend, in payment of his legacies. And that the rule relieving a purchaser from seeing to the application of his purchase money where there is a general charge of debts and legacies, has reference to the state of things at the death of the testator ; and if the debts are afterwards paid leaving the legacies charged, that circumstance cannot vary the rule.

 1839.—*Scoones v. Morrell.*

from what he had heard, to make some further inquiries as to the testator's will, it seeming, as he understood, that the gentleman who made the will had made his father sole devisee and residuary legatee under the will, and was also a witness to the same. An affidavit of the attesting witness as to the execution of the will of the testator was produced, and to satisfy the other objection, an affidavit was made with respect to the identity of the lands.

These affidavits were accompanied by a letter, dated the 5th of May, 1832, expressing a hope that they would be satisfactory; but the reply was, that he, the purchaser, must examine the different abstracts, affidavit, and plan, on the spot, to ascertain their accuracy. Another letter was then sent from the vendor's solicitors to the defendant, dated the 14th of June, 1832, stating that having received no answer to their last application on the subject of the purchase, they were directed to say, that a bill would be now immediately filed against the purchaser for the fulfilment of his contract. No notice having been taken of this letter, the bill was filed on the 11th of July, 1832.

[*253] *The defendant put in his answer on the 15th of November, 1832, in which he objected that the will of the testator was not duly executed, by the testator in the presence of the witnesses, and that he was not competent so to do; and he insisted that the plaintiffs were not able to perform the contract, for they had not made out a good title, and pending the suit to establish the will, they could not compel the performance of the contract, but he did not state in what other respect he was dissatisfied with the title. Upon this the vendor endeavored to obtain a deed of confirmation from the heir of the testator, but the purchaser advised him not to confirm the will. A suit was instituted against the heir to establish the will, which was established pending the proceedings in this cause, by a decree dated the 12th of May, 1835. this cause was first heard on the 15th of February, 1836, when a reference was made to the Master, to inquire whether the plaintiff could make a good title to the estate, and when such title was first shown, with liberty to state special circumstances.

In the Master's office the defendant took a variety of objections to the title, amounting to twenty-seven, nearly the whole of which had not been insisted upon by him prior to the institution of the suit, some of which were answered and some abandoned. One of the objections related to a mortgage, of which no mention had been made for upwards of 100 years, and which it was contended by the vendors, independently of the recent limitation act, was sufficient proof of its having been satisfied; but in consequence of the objection being pressed, search was made among the old deeds, when the original mortgage deed was found cancelled, with a proper receipt endorsed, and also a release dated in 1744; the vendor contended, that no evidence of [*254] the satisfaction of this mortgage had been required by the *defendant, until his objections had been brought into the Master's office, or it would have been furnished.

Several certificates, evidence as to the enclosure of some strips of waste

1839.—*Scoones v. Morell*.

land, in opposition to the evidence produced by the vendor, and several affidavits were produced in the Master's office to show the births, deaths, &c.

The Master, by his report, dated the 21st of July, 1837, certified "that the plaintiffs could make a good title to the estate and premises comprised in the agreement;" and with respect to special circumstances, he found "that the plaintiffs had, by their state of facts, stated circumstances to show that, in consequence of the defendant having entered into possession and exercised certain acts of ownership, he was precluded from insisting on any objections not taken to the title before he entered into possession, especially any that were obvious on the face of the abstracts;" and he found that a counter state of facts had been brought in by the defendant; "but it not having been referred to him to inquire whether the defendant had or not accepted the title, he, the Master, had not thought fit to inquire into such special circumstances, or to state them in his report."

The defendant took seven objections to the Master's report, the principal of which related to about fourteen small pieces of land lying between the king's highway and old enclosures, forming part of the estate, and varying in size between an acre and three quarters and five poles, which had been at different periods between eighteen and thirty years, enclosed by the owner of the adjoining old enclosures, and as to which, it was insisted by the purchaser, that a good title could not be shown.

Mr. *Bethell*, in support of the exceptions, relied on the evidence [*255] as showing, that these small portions of waste "were contiguous to or communicated with open commons immediately adjoining the same," and that, therefore, the presumption that they belonged to the owner of the adjoining old enclosure was rebutted. As to some of these he insisted they were essential to the enjoyment of the property, and that without them a specific performance could not be decreed, or at least that they ought to be the subject of compensation.

Mr. *Pemberton*, Mr. *Kindersley*, Mr. *James Campbell* and Mr. *T. Payer*, contra, argued that the evidence did not bear out the proposition contended for by the defendant, that the enclosed portions were contiguous to any common, but that they abutted on the king's highway, and, therefore, that the legal presumption arose, that they belonged to the owner of the adjoining enclosure. They relied upon *Grose v. West*,^(a) where it was held, *prima facie*, the presumption is, that a strip of land lying between a highway and the adjoining enclosure is the property of the owner of the enclosure: but if the strip of land communicate with open commons or other larger portions of land, the presumption is either done away or considerably narrowed, for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them. *Steele v. Prickett*,^(b) *Doe dem. Barrett v. Kemp*,^(c) affirmed in the Exchequer Chamber.

(a) 7 Taunt. 39.

(b) 2 Stark. 467.

(c) 7 Bing. 332.

 1839.—*Scoones v. Morrell.*

Mr. *Bethell*, in reply.

[*256] *THE MASTER OF THE ROLLS:—In all cases of this description the question is one of presumption, and I am never surprised at an objection being taken to a title on this ground; but looking at all the circumstances of the case, looking at the situation of these portions of land, and having regard to the number of them which have been taken in by the owner of the adjoining old enclosures, and the length of time since they were taken in, I am of opinion that the legal presumption does arise that the owner of the adjoining land was entitled to enclose them. Then the only question is, if this presumption is rebutted by the evidence; I am of opinion that it is not. The evidence brought forward to rebut it, is quite unsatisfactory; and the exceptions must, therefore, be overruled.

The case then came on for further directions, when Mr. *Bethell*, for the purchaser, contended that, the title having been made out in the Master's office, the plaintiff ought to pay the costs of the suit.

Mr. *Pemberton*, Mr. *Kindersley*, Mr. *James Campbell*, and Mr. *T. Paynter*, contra.

THE MASTER OF THE ROLLS:—There is no doubt that the contract must be performed, the purchase money paid, and the conveyances executed; and the only remaining question is, who is to pay the costs of the suit. The

Master has reported, "that a good title was first shown pending the [*257] proceedings in his office;" the costs, in all cases, materially *depend on when a good title was first shown, but that is not and cannot be considered conclusive. It frequently happens that the duty which the vendor has undertaken to perform in making out a good title, is interrupted by some claim or demand on the part of the purchaser, which cannot be sustained, and which gives rise to a suit; the consequence may be, that something remains to be done, which is not done until the suit gets into the Master's office, but which the vendor would have done without suit, if an opportunity had been afforded him. In such a case, the fact of the title having been perfected in the Master's office does not determine the question of costs, and then it becomes absolutely necessary to look into the circumstances.

The question really is, whether the defects which have been removed in the Master's office were the occasion of the suit. [His Lordship recapitulated the circumstances of the case.] Now, if the validity of the devise had been the only objection relied on, there would have been a speedy termination to the suit after the will had been established in May, 1835; but, upon the hearing of this cause in February, 1836, the purchaser takes a reference to the Master to inquire into the title, and then raises all possible objections to the title, most of which, however, were overruled; one of them related to a mortgage mentioned in a deed of upwards of 100 years old, which had not been since heard of: the vendor contended that the mortgage term must be presumed to have been satisfied, but, upon search, an old deed of reconveyance

 1839.—Addis v. Campbell.

was found. This fact was relied on by the defendant, as showing that a good title had not been previously made out; but, because new evidence was brought forward in the Master's office by the vendors, must it necessarily be taken for granted that a good title had not previously been made out, and must the vendor, *on that account, pay the costs? To establish [*258] such a rule would be most prejudicial, not only to a vendor but to a purchaser; for the vendor would thereby be deterred from bringing forward any new evidence in the Master's office in confirmation of his title, for fear of rendering himself liable to pay the costs of the suit. I am of opinion that the suit was not occasioned by the objections which have been removed in the Master's office; and the purchaser must, therefore, pay the costs of this suit.[1]

 ADDIS v. CAMPBELL.

1839: May 23, 24.

Where on a motion for the production of papers admitted to be in the defendant's possession, the right to their production depends on documents stated in the bill, but which are neither admitted nor denied by the answer, the plaintiff is at liberty to verify such documents by affidavit.

This was a motion for the production of deeds and papers admitted to be in the possession of the defendant Mr. Campbell.

Mr. Campbell was the devisee for life of the estate in question in the cause under the will of Francis Gostling; and against him, the case alleged by the plaintiff was that Henry Joseph Addis, the plaintiff's father, being in the year 1819 entitled to the reversion of the estate subject to the life interest of Francis Gostling and in default of his issue, was induced to sell that reversionary interest to one John Crook for an inadequate consideration; that Francis Gostling in 1828 had notice of this sale and of its invalidity, and with such notice, purchased the right of Crook, and prevailed on Henry Joseph Addis to confirm the purchase.

The defendant stated his belief of the sale from Henry Joseph Addis to Crook, and of the conveyance by Crook and Henry Joseph Addis to Francis Gostling; *but insisted that the transaction was fair, and sub- [*259] mitted that, under the circumstances, the sale to Francis Gostling having been made *bona fide* and without fraud or concealment, upon payment of a full and valuable consideration, and confirmed by Henry Joseph Addis, a person of full age, sound mind and competent understanding, ought not to be disturbed by any person claiming under him; and he resisted the production of the documents on the ground, that as the purchase was fair, the title of Francis Gostling was good, and that the plaintiff had no interest in the estate.

[1] Vide *Taylor v. Brown*, 2 Beav. 180.

1839.—*Addis v. Campbell.*

The transaction was evidenced by the conveyance of Henry Joseph Addis to Crook, the subsequent conveyance of Crook and Henry Joseph Addis to Francis Gostling, by a cancelled bond executed by Crook to Henry Joseph Addis, and, as was alleged, probably by some other documents mentioned in the schedule to the answer.

The defendant by his answer, said that he was ignorant of the nature of the transaction between Henry Joseph Addis and Crook, otherwise than as it appeared on the instruments; but he alleged, that the subsequent conveyance to Francis Gostling was entirely fair and for full consideration; and in this state of things the plaintiff desired to read a letter written by Francis Gostling to a Mr. Costigan before the date of his own purchase, as showing his view of the sale to Crook. The letter was set forth in the bill as a material part, or as evidence of a material part of the plaintiff's case; the defendants did not deny that it was written by Francis Gostling as alleged, but said they did not know and could not set forth, &c., whether Francis Gostling did or did not write or send such letter.

[*260] On this motion a question was made, whether, upon *such a motion as this, an affidavit that the letter was in the handwriting of Francis Gostling could be read.

Mr. *Pemberton*, and Mr. *J. W. Hill*, in support of the motion, proposed reading an affidavit verifying the letter written by Gostling to Costigan, which showed that previous to the purchase by him from Crook he was aware of the doubtful nature of the transaction between Crook and the plaintiff's father. They contended that the plaintiff was entitled to the production, among others, of the two deeds and the cancelled bond, without which the plaintiff would be unable to make out his case; they cited *Kennedy v. Green.*(a)

Mr. *Kindersley* and Mr. *Roupell*, contra, objected to the affidavit being read, insisting, that although a document which was neither admitted nor denied by the answer, could, by the practice of the court, be verified on an application for an injunction or for a receiver, yet that the same rule did not prevail on applications for the production of documents; that the two cases materially differed, for an injunction might be obtained on affidavit, whereas the order for the production of documents depended solely and entirely on the admissions contained in the answer of the defendant, to which admissions the plaintiff was confined.

They resisted the production of the documents, contending that the mere filing a bill containing fictitious allegations could not entitle a plaintiff to the production of the title deeds of any party he chose to make a defendant; that the rule as to purchases of reversions did not apply to a case of an estate tail, which depended on the death without issue of a prior tenant for life, the *value of which could not be calculated; nor to dealings between a tenant for life and a tenant in tail.

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THE MASTER OF THE ROLLS :—It is true that a plaintiff cannot, by affidavit, show that a particular document is in the possession of a defendant; he must make out his case, so far, from an admission in the answer; but what is sought here, is to verify a document the existence of which is neither admitted nor denied; my impression is, that for such a purpose, an affidavit is admissible: I will, however, examine the authorities.

May 24.—THE MASTER OF THE ROLLS :—As this was the purchase of a reversionary interest, it is subject to the restrictions and conditions which this court has imposed on transactions of that nature: the purchaser is to show that there was no fraud and that he gave a full and adequate consideration; and I conceive that he must be held bound to show what the particulars of the transaction were, for the purpose of showing that the transaction itself was fair.

It may be considered as a general rule, that when a motion is made upon an answer, no affidavit is to be read in contradiction of the statements made in the answer: there is an exception in cases where orders have been made or notices given of motions to be made, on affidavits, before the answer was put in; [1] and the rule has not been permitted to operate so as to exclude, nor does it in terms exclude affidavits of documents stated in the bill, which, therefore, the defendant has an opportunity of denying, but as to which he states that he knows nothing about them; and in cases of this kind it 'has been permitted to read affidavits, for the purpose of verifying [*262] documents which are material. The cases in which such affidavits have been read, have been motions for injunctions to stay proceedings at law, and on showing cause against dissolving such injunctions; [2] and I do not think that affidavits of the same kind can properly be refused in cases like the present. (a)

The letter, when read, shows that Francis Gostling was fully aware that the transaction with Crook, was, to say the least of it, open to some doubt; there is quite enough to affect him with any liability to which Crook was subjected; and, independently of the letter, he knew that he was purchasing a reversionary interest and thought it convenient to procure the concurrence of Henry Joseph Addis; something he was to obtain from him by procuring him to join in the conveyance, and the transaction itself imposed upon him

¹ *Taggart v. Hewlett*, 1 Mer. 499; *Morgan v. Goode*, 3 Mer. 10; *Jefferys v. Smith*, 1 Jac. & W. 296; *Borrett v. Tickell*, Jacob, 154, [157, n. 1.]

² The exception applies also where an insufficient answer has been put in, to exceptions to which the defendant has submitted, and the question arises before the further answer is filed. An imperfect answer is only an affidavit against which affidavits may be filed. *Smith v. Cleasby*, 10 Sim. 31.

³ As to the admissibility of affidavits, in cases of this description, see further *Ord v. White*, 3 Bear. 357, 367; an extract from the decision of the M. R. in that case will be found 10 Sim. 93, n. 1. See besides the authorities there referred to, *The Village of Seneca Falls v. Matthews*, 9 Paige, 504.

1839.—Wilson v. Metcalfe.

the obligation to prove, whenever called upon, that it was in all respects a fair transaction. The *onus probandi* in cases of this nature does not, as in ordinary cases, rest with the party who alleges fraud or unfairness, but with the party who has thought fit to purchase the reversionary interest by private contract; [1] and in such a case as this, I am of opinion that the defendant must produce such deeds and documents as tend to show the nature of the transaction, the consideration given and the value. (a)

[*263].

WILSON v. METCALFE.

1839: June 6, 18.

A defendant, against whom a sequestration had issued, was entitled to a rent charge issuing out of the estate of A. B., with power of distress; the rent charge being in arrear was claimed both by the sequestrators and the defendant: A. B. offered to pay the arrears to the sequestrators on being indemnified; but no protection having been offered her, she paid over the arrears to the defendant, who threatened to distrain: Held, that A. B. was entitled to protection, and that an application ought to have been made to the court for an order for her to pay; and that, under the circumstances, she was not liable to repay the amount to the sequestrators.

Choses in action are subject to the process of sequestration. In a clear and simple case a sequestration may be made effective in respect of choses in action by an order only, or a voluntary payment may be protected, in other cases it may be necessary to resort to an action or suit under the direction of the court.

Order made for payment to sequestrators, by a party out of whose estate the same was issuing, of a rent charge payable to the person whose estate was sequestered.

THIS was a motion made on behalf of the plaintiffs, that Mrs. Elizabeth Brown (who was no party to the cause) might be ordered to pay to the commissioners of sequestration, the sum of 275*l.*, being the arrears of an annuity up to the 17th of June, 1838, payable by Mrs. Brown to the defendant John Ness, (the party against whom the sequestration had issued, and that she might also, in like manner, be ordered to pay the future sum due in respect of the same annuity.

It appeared that John Ness and Mary Ness having been ordered to pay a sum of 477*l.* 6*s.*, and John Ness being a prisoner in the Fleet and in contempt for non-payment, a commission of sequestration issued against him on the 2d day of November, 1837.

He was entitled to a rent charge of 50*l.* a year issuing out of the estate of Elizabeth Brown, and at the date of the sequestration a sum of 225*l.* was due to him from Elizabeth Brown for arrears of the rent charge.

(a) *Atkyns v. Wright*, 14 Ves. 214; *Beckford v. Wildman*, 1 Swans. 125; 16 Ves. 441; *Lingen v. Simpson*, 6 Mad. 290. *Balch v. Symes*, 1 Turn. & Russ. 92; *Codrington v. Codrington*, 3 Sim. 519; *Kennedy v. Green*, 6 Sim. 6; *Fencott v. Clarke*, 6 Sim. 8; *Princess of Wales v. Lord Liverpool*, 1 Swans. 114; *Tyler v. Drayton*, 2 Sim. & Stu. 309.

[1] Vide *Hinckman v. Smith*, 3 Russ. 433. 1 Story's Eq. § 336, 338. Lloyd & G. 74, note.

1839.—Wilson v. Metcalfe.

On the 8th of December, 1837, a copy of the sequestration was served on Mrs. Brown and from the evidence it appeared that a demand of arrears of the annuity was made upon her.

She admitted that 225*l.* was due, and that that sum had been placed by her and then was in the branch bank at New Malton, [*264] ready to be paid to the party entitled. On the 22d of December, 1837, the sequestrators demanded payment of the 225*l.* of the branch bank, but which demand was not complied with. On the 17th of June, 1838, a further sum of 50*l.* accrued due in respect of the annuity, making in the whole 275*l.*

In July, 1838, the solicitor of John Ness demanded of Mrs. Brown the immediate payment to him on behalf of John Ness, of the arrears of the annuity, whereupon her solicitor offered to the solicitor of the plaintiffs, who acted also as the solicitor of the sequestrators, to pay him the arrears of the annuity and the future payments, on the condition that he would indemnify and save harmless Mrs. Brown against all consequences arising from such payments. No such indemnity having been given, John Ness, on the 23d of August, 1838, threatened, that unless the arrears were paid to him before the 3d of September, next, he would distrain.

Mrs. Brown's solicitor again repeated the offer of payment to the sequestrators, on receiving a sufficient indemnity, but the solicitor of the plaintiffs and of the sequestrators "declined to make himself liable and said, there were no parties plaintiffs in this suit who could give any satisfactory indemnity." Nothing having been done for the security of Mrs. Brown, she on the 4th of September, 1838, paid over the amount of the arrears to the solicitor of John Ness.

The commissioners again demanded payment of the 275*l.* on the 5th of March, 1839, which not having been paid, notice of this motion, for payment of the 275*l.* and all future payments, was given on the 3d of May, 1839.

*Mr. Pemberton and Mr. E. R. Daniell, in support of the motion, [*265] contended that the case of *Johnson v. Chippendall*,^(a) which would be relied on for the respondent, was not applicable; for there the sequestration was on mesne process for want of answer, while in the present case the sequestration was founded on a decretal order for payment of money; again, the property in this case was a rent charge with power of distress, which was not a *chose in action*: here there was a clear admission of the amount due and of a liability to pay.

That Mrs. Brown was bound, after notice, to pay the annuity to the sequestrators, and that the court would have protected her after such payment, and restrained John Ness from taking any proceedings against her for the recovery.

(a) 2 Sim. 55.

1839.—Wilson v. Metcalfe.

They cited *Simmonds v. Kinnaird*,^(a) *Francklyn v. Colhoun*,^(b) *Opie v. Maxwell*,^(c) *Pelham v. Duchess of Newcastle*.^(d)

Mr. Tinney and Mr. Wilbraham, contra, for Mrs. Brown, made no objection to any order for payment of the annuity for the future, which the court, in the presence of John Ness, might make, and which would be a sufficient indemnity to Mrs. Brown.

As to that part of the motion which sought to make the respondent pay the arrears a second time, they observed, that the motion was made by the plaintiffs, and not by the sequestrators; that there was not even a suggestion that any indemnity or protection had ever been offered to Mrs. [*266] Brown; she was a stranger to the cause, *and ought not to be left unprotected against the legal power of distraining which John Ness possessed and threatened. That the money having been deposited, and ready to be paid to the party entitled, the plaintiffs ought to have filed a bill or applied to the court for such an order as would have protected the respondent, and not having done so, and having been guilty of great laches, the respondent ought not to be made liable to pay over again a sum which she had once been compelled to pay by threats of legal process.

That the arrears of a rent charge were stated by Lord Coke to be choses in action, and that a chose in action was not liable to sequestration; *Johnson v. Chippendall*^(e) a case elaborately considered by the Vice-Chancellor.

That the writ of sequestration did not in its terms^(g) authorize the commissioners to seize a chose in action; and that the authority to sequester differed materially from the appointment of a receiver, for the latter directed payment and attornment, and, therefore, of itself afforded a sufficient indemnity to a party making payments to the receiver.

Mr. Pemberton in reply.

THE MASTER OF THE ROLLS:—I will read over the affidavits before I finally decide the case. John Ness having been served with notice of this motion, I am clearly of opinion, that as to the future payments, the order ought to be made. Mrs. Brown, it appears, on an application being made to her, unreservedly gave the information which she ought to have [*267] given, that she was liable to pay the annuity, and *that 225*l.* was then due for arrears, and had been placed in the branch bank, so that at this time there was no controversy as to the amount due; and if this had been then brought on before me by motion to pay the money into court, I should have had no hesitation in ordering payment; this being a chose in action,—there being no dispute as to these sums being due from Mrs. Brown to John Ness, and there being no question of liability or of account, but, on the contrary, there being a clear admission of these sums being in her hands belonging to the person whose estate had been ordered to be sequestered. I am of opinion, moreover, that if this sum of 225*l.* had been paid under such

(a) 4 Ves. 735.

(b) 3 Swan. 276

(c) Cited in argument in 4 Ves. 742, 744

(d) 3 Swan. 284, n.

(e) 2 Sim. 55.

(g) Hinde, 137.

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an order, there would have been ample protection and indemnity to her, and that John Ness would not afterwards have been permitted to take proceedings against her in respect of such sums.

Notice of the sequestration was given to the branch bank shortly after, but unfortunately nothing further was done from December, 1837, to July, 1838. During this time every thing required for the security of all parties might have been done; but in July, 1838, John Ness, who had a right of distress, made a demand and threatened proceedings. Whatever may be the jurisdiction of the court in cases of this nature, it cannot be doubted, that persons claiming under a sequestration are bound to do all that is requisite for the protection of the parties made liable to pay. A demand was made by Ness, who had a legal title and might distrain, and Mrs. Brown's solicitor then asked for an indemnity; I do not think this was proper if he meant a bond or mortgage, but if he meant that an application should be made to the court for such an order as would protect his client, it was very reasonable. The parties, however, seem to have entered into a controversy as to the jurisdiction of the court, each producing authorities in support of their opposite views; and in August, 1838, John Ness applied again, and gave [*268] notice that if payment was not made by the 3d of September, he would distrain for the recovery of the arrears. This was communicated to the solicitor of the plaintiffs, and nothing was done, and the money was unfortunately paid over. The question to be decided is, whether it was not the duty of the plaintiff to obtain such an order from the court, as would save Mrs. Brown from any proceedings which might be adopted by Ness, and if the plaintiffs are entitled to make her pay over again; I must carefully consider the affidavits before I come to such a conclusion. It is quite a different thing to obtain an order for payment before she had paid it over, which would have protected her, and now coming for an order to compel her to pay it to the sequestrators after she has once paid it to Ness; but if Mrs. Brown has paid it over under an indemnity, I should then order her to repay the amount: an affidavit must therefore be produced to show that she has received no indemnity.

An affidavit denying that any indemnity had been given was subsequently produced.

June 18.—THE MASTER OF THE ROLLS (after stating the sequestration and the demand) proceeded: Mrs. Brown admitted that 225*l.* was due, and that that sum had been placed by her and then was in the branch bank ready to be paid to the party entitled.

In this state of things, and in the absence of any question as to her liability to pay the 225*l.*, or as to the right of John Ness to receive it, if an application had been made for the payment of the 225*l.* to the sequestrators, or into court, I think that an order to that effect ought to have been made.

*But there was no such application, and in July, 1838, the arrears [*269]

 1839.—*Wilson v. Metcalfe*.

had accumulated to 275*l.*, and a demand for payment was made by John Ness; this demand was communicated to the solicitor of the plaintiff, who appears to have acted for the sequestrators; and the solicitor for Mrs. Brown offered to pay the sum due on being indemnified. I think that the plaintiff or the sequestrators were bound to proceed in such a manner as would protect Mrs. Brown from the demands of Ness, and that she would have been protected if an order had been obtained directing her to pay as she was willing to do; but unfortunately, instead of pursuing this simple course the parties entered into a correspondence about the law of this court respecting sequestrations, and after some further delay, Ness gave notice that he would distrain if he was not paid by the 4th of September; and notice of this threat having been communicated to the plaintiff, and nothing being done upon it, the sum of 276*l.* was paid to the solicitors of Ness.

It is now moved that Mrs. Brown may pay this sum over again to the commissioners of sequestration; but I think that I ought to make no such order.

I have read the case cited in the arguments and many others: and it appears to me that in such a case as this, a chose in action is subject to the process of sequestration, but how the sequestration is to be made effective in respect of choses in action may be a question requiring much consideration; in a clear and simple case it may be by order only, or a voluntary payment may be protected; in other cases it may be necessary to resort to an action or suit under the directions of the court. But I consider it to be clear, that if [270] the party owing the debt requires protection, he ought to have it, *and that even if he is willing to make payment, the court would not order it, unless it appeared that protection would be afforded.

In this case, Mrs. Brown was willing to pay, but desired protection: she might I think have had protection by an order upon motion of which John Ness had notice; but being left unprotected from December, 1835, to September, 1838, I think that she was not bound to await the distress which John Ness threatened, and is not liable to pay the money over again. The ground of my decision is, that the plaintiff or the sequestrators, having ample time and opportunity, did not, as they might have done, apply for an order of payment, and it was evident that Ness would distrain, if payment were not made to him.

I think that Mrs. Brown ought to pay the sums hereafter to become due to the sequestrators after deducting the costs of this motion.[1]

[1] Vide *Egan v. Heenan*, 1 Flan. & Kel. 39. *Hodgens v. Wheeler*, Sausee & Sc. 443.

1839.—Pickwick v. Gibbs.

ROSE v. ROLLS.

1839: March 19.

On application for payment out of court of money belonging to a *feme covert*, it must either be shown that there has been no settlement or agreement for a settlement; or if any settlement exist, it must be produced, to enable the court to judge whether it effects the fund in question: it is not sufficient to show by affidavit that the particular fund is not the subject of any settlement.

On a petition for the payment out of court of money belonging to a married woman, the evidence of its being unaffected by any settlement was the affidavit of "the petitioner Josiah Clark and wife, which [*271] stated "that no settlement or agreement for a settlement, had at any time been made or executed by these deponents or either of them, affecting or concerning the rights, shares, or interests of these deponents or either of them, in the shares or interest of these deponents, or any part or portion thereof."

Mr. Steere, in support of the petition.

THE MASTER OF THE ROLLS held this affidavit insufficient, observing, that if any settlement existed, the petitioners were not competent judges of its effect. That many instances had recently occurred where parties had made similar affidavits, representing that a settlement did not affect the property in question, yet on inspection of the settlement it turned out to be quite the reverse. It was therefore necessary either to produce the settlement or to show that none existed.(1)

PICKWICK v. GIBBES.

1839: January 30.

A testator directed his trustees, as soon as convenient after the decease of his wife, to raise 10,000*l.* for his nephew, an infant, and to invest and apply the income towards his maintenance. The testator had previously given his wife an annuity of 1000*l.* a year, payable quarterly. The wife pre-deceased the testator: Held, that the infant was entitled to interest on his legacy from the testator's decease.

THE testator in this case, by his will, amongst other things, gave his wife an annuity of 1000*l.* a year, by quarterly payments, to be made at the end of one calendar month from the day of his decease. By a codicil to his will, dated the 21st of June, 1835, the testator directed his trustees or trustee for

(1) The above case is somewhat obscure. But the decision evidently rests upon the principle of the protection which courts of equity extend to married women: the judge in equity is, *ex officio*, bound to protect her rights, without any suggestion of counsel on her behalf, where the husband seeks to become possessed of her separate property through the intervention of the court. *Frank v. Frank*, 2 Mylne & Cr. 171, 179. *Howard v. Moffat*, 2 Johns. Ch. Rep. 206. *Glen v. Fisher*, 6 Johns. Ch. Rep. 33. *In the matter of Stuart*, 1 Edw. Ch. Rep. 168. 1 Keen, 73, n. 2.

 1839.—*Pickwick v. Gibbs*.

the time being of his will, to levy and raise, as soon as conveniently [*272] might be after the decease of his said wife, the sum of *10,000*l.*, by and out of his residuary personal estate; and to stand possessed thereof, upon trust, to invest the same in the public stocks or funds, and to stand possessed thereof, upon trust, from time to time, to pay and apply the interest or dividends thereof, or so much thereof as might be necessary, unto and for the maintenance and education of the plaintiff, Charles Sainsbury Pickwick, until he should attain his age of twenty-one years; and to accumulate the residue; and on the plaintiff attaining the age of twenty-one years, then upon trust, to transfer the said trust moneys unto the plaintiff, Charles Sainsbury Pickwick, to and for his own use and benefit; but if the plaintiff should die before attaining his said age of twenty-one years, then he directed that the sum of 10,000*l.*, and the securities on which the same should be invested, should sink into his residuary personal estate. And he declared that it should be lawful for the trustees or the trustee for the time being of his will, and at any time or times, to apply any sum, not exceeding 2000*l.*, out of the said sum of 10,000*l.* for or towards the advancement in the world or placing out in any profession or business or employment, or otherwise for the benefit of the plaintiff, although he should not then have attained the age of twenty-one years.

The testator's wife died in September, 1835, and the testator himself afterwards died in December, 1837; and the question now raised, was whether interest was payable on the legacy of 10,000*l.* from the death of the testator, or from the expiration of one year from the testator's death.

Mr. *Piggott*, for the plaintiff, argued, that the trustees having been directed to raise the 10,000*l.* as soon as convenient after the death of the wife, this legacy would have become payable immediately on her death if she [*273] *had survived the testator but a month, and would have carried interest from that period; that consequently, as the wife died in the testator's lifetime, the legacy became payable immediately on his decease; and therefore, that the legatee was entitled to interest from the time of the testator's death.

Mr. *Kindersley* and Mr. *Lowndes* contra, for the residuary legatee. The court has established a general rule of convenience, that interest is payable on legacies from the expiration of a year from the testator's death. This general rule is modified in special cases; as *first*, where the legacy is specific; or *secondly*, where a provision is made by a testator for his child; or *thirdly*, where interest is payable to one for life with remainders over; or *fourthly*, where the testator has placed himself *in loco parentis*. The plaintiff's case does not come within either of these exceptions.

Where a legacy is to be paid as soon as convenient after the testator's death, interest is payable thereon from the expiration of a year from the time of his death. They admitted, that if the wife had survived the testator one month, that interest would then have been payable on the legacy from her death.

1838.—Allen v. Coster.

Mr. Piggott in reply.

THE MASTER OF THE ROLLS said that the case was doubtful ; but in his opinion the legatee was entitled to interest from the testator's death. The intention was that the legatee was to have maintenance from the wife's death ; and the wife having pre-deceased the testator, interest for his maintenance became payable from the testator's death.[1]

*ALLEN v. COSTER.

[*274]

1838: December 21.

A fiat of bankruptcy issued against the master of an apprentice, but was afterwards annulled, by means of a composition between the bankrupt and his creditors : Held, that the indentures of apprenticeship were discharged.

UNDER the will of a Mrs. Browne, the two infant plaintiffs, George Allen the younger and Elizabeth Allen, were entitled to certain property.(a) Two bills had been filed, one on the 18th of February, 1837, and the other on the 18th of April, 1838, and the court, in consequence of the very improper conduct of the parents of the plaintiff, in July, 1838, appointed Mr. Underwood their guardian.

In September, 1837, George Allen the father, by indentures of that date, bound his son, the infant plaintiff, apprentice to John Norris Andrews, a grocer, corn-factor and meal-man, for four years.

On the 25th of May, 1838, a fiat of bankruptcy issued against J. N. Andrews, but which was afterwards annulled, on the petition of J. N. Andrews with the consent of his creditors, by an order of the Court of Review, dated the 25th of June, 1838 ; the consent of the creditors was obtained in consideration of J. N. Andrews having consented and agreed to pay them a composition of ten shillings in the pound on the amount of their respective debts.

In October, 1838, the infant, without previous intimation, quitted the service of J. N. Andrews, who obtained a warrant for his apprehension, as a runaway apprentice ; but, on the undertaking of Mr. Underwood to produce the plaintiff, the magistrates allowed the matter to stand over until the sessions ; and nothing had since been done in the matter.

(a) See ante, p. 202.

[1] As a legacy is not payable, unless the will contain directions for anticipating the payment, until a year after the testator's death, interest can only commence running from the time when it is payable, either by the lapse of a year, or the arrival of the period directed for payment. But the general rule admits of very important exceptions and qualifications, and in many instances interest has been allowed, as in the case in the text, under the particular circumstances, when it could not be claimed under the general rule. A controlling circumstance is the intention expressed or implied of the testator to provide for the maintenance and education of an infant legatee : and the nearer the relationship between the parties, the more stringent is the presumed intention. *Wood v. Vandenberg*, 6 Paige, 287. *Williamson v. Williamson*, id. 298, 301. *Marsh v. Hagar*, 1 Edw. Ch. Rep. 187. *Lloyd & G.* 6, note. 2 Keen 601, n. 1 ; 602, n. 3, and authorities there cited ; particularly *Lupton v. Lupton*, 2 Johns. Ch. Rep. 628. *Sullivan v. Winthrop*, 1 Sumn. 1.

1838.—Allen v. Coster.

[*275] *The infant plaintiffs now presented a petition, praying that the indentures of apprenticeship might be delivered up to be cancelled, and for a reference to the Master to approve of proper proceedings for that purpose; and that the Master might report, whether it would be proper that any sum should be paid to J. N. Andrews for compensation.

Mr. *Pemberton* and Mr. *Girdlestone*, for the petition, contended, that the infant plaintiff being a ward of court, the father was not justified in binding him an apprentice without the sanction of the court: they also insisted that the bankruptcy had annulled the indentures, relying on the sixth G. 4, c. 16, s. 49, whereby it is enacted, "that where any person shall be an apprentice to a bankrupt, at the time of issuing of the commission against him, the issuing of such commission shall be and enure as a complete discharge of the indenture or indentures, whereby such apprentice was bound to such bankrupt."

Mr. *Cooper*, contra, on behalf of J. N. Andrews, submitted to the jurisdiction of the court; but he contended that the court only interfered with the paternal control, where the father came to the court for maintenance for his child; that in September, 1837, at least, before the guardian had been appointed, it was competent to the father to bind his son apprentice; and, consequently, that the indentures were legal and binding; that there was no authority for the proposition, that indentures of apprenticeship between a father and a stranger to the suit were invalid, because proceedings were pending at the time, respecting the child's property.

He argued, that by annulling the fiat, the indentures were still binding, and relied on the 1 and 2 W. 4, c. 56, s. 19, whereby it is enacted, [*276] "that it shall be lawful for *the Lord Chancellor upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission, according to the existing laws and practice in bankruptcy."

That the effect of annulling the fiat being the same as a supersedeas, the parties were remitted to their original rights, as if no fiat had ever issued. (a)

If however, the court considered that the indentures ought to be cancelled, Mr. Andrews submitted to the jurisdiction, but considered himself entitled to the costs of the indentures which he had paid, and of the maintenance and clothes which he had furnished to the infant, and of this application.

Mr. *Kindersley* and Mr. *Rogers*, for Mr. Underwood.

THE MASTER OF THE ROLLS:—I must order the indentures to be delivered up to the guardian.

It is not necessary for me to decide whether any indentures of apprenticeship could under the circumstances in this case be sustained, for I am of

(a) *Ex parte Jackson*, 8 Ves. 534

 1839.—Lambert v. Hutchinson.

opinion, that if the indentures of apprenticeship were originally valid, they became annulled by the issuing of the fiat of bankruptcy. I do not say, that in every case where a fiat is afterwards annulled, the indentures of apprenticeship remain invalid, for I can conceive many cases in which the fiat may have been improperly taken out, and afterwards annulled; and in such a case, the court would put the parties in the same situation as they were in before the issuing of the fiat. Here the fiat was *annulled, . [*277] in consequence of an agreement between the bankrupt and his creditors, the latter consenting to receive a composition of ten shillings in the pound. I am of opinion that such an agreement between the bankrupt and his creditors cannot affect the rights of other persons who are not parties to the arrangement, the bankrupt act being positive that the issuing of a commission shall enure as a complete discharge of the indentures whereby an apprentice is bound to a bankrupt.

This is not a case in which I can order a reference to settle the compensation to be paid to the master of the apprentice; for under the circumstances, I am at a loss to know what compensation he could be entitled to; I think, however, that he should have the costs of this application.

 LAMBERT v. HUTCHINSON.

1839: February 13, May 7.

The bill sought a general account of the estate of a testator who died in 1807, one of the co-plaintiffs being held bound by a settlement of accounts in 1822: Held, that in this suit, all the other co-plaintiffs were equally bound by that settlement, and that in this suit the accounts could only be directed on the footing of such settlement.

Notwithstanding a misjoinder of plaintiffs, the court permits a decree to be made at the hearing, when it appears that justice can be done to all parties notwithstanding the misjoinder.

THIS bill was filed by Nutty Lambert and Harriet Curling, two of the children of James Hutchinson deceased, and by their trustees, and James Bunce Curling and Henry Curling, the two children of Harriet Curling, against Catharine Margaret Irene Hutchinson, the legal personal representative of the said James Hutchinson, and other persons who were interested in his estate, as deriving title under Bury Hutchinson, Elizabeth Ursula Hutchinson and Adria Snow, the three other children of James Hutchinson.

*The testator, James Hutchinson, died in the year 1807. The bill [*278] alleged that his estate had not been duly administered, and prayed for the usual accounts and relief in such cases, and a declaration that the plaintiffs were not bound by certain compromises and settlements alleged to have taken place.

The plaintiffs insisted that the accounts must be taken from the time of the testator's death; whilst it was alleged by the defendant, Catharine M. I. Hutchinson, that a settlement had taken place in the month of December,

1839.—*Lambert v. Hutchinson.*

1822, and that the accounts ought to be taken from that time only : the question in the cause was, from what time the account was to be taken.

The testator at the time of his death had five children, an only son, Bury Hutchinson, and four daughters, namely, Elizabeth Ursula Hutchinson who never married, and died after the testator's decease ; the plaintiffs, Nutty Lambert and Harriet Curling ; and Adria Snow, who died after the testator's death, leaving children. The testator's estate was to be divided equally amongst his five children, but the shares of the daughters, were to be settled upon them for their separate use for life, with remainder to their children, and if any died without leaving children, the share of such was to go to the surviving children of the testator.(a) Bury Hutchinson, the son and a Mr. Sherson, were appointed trustees and executors of the will ; but Mr. Sherson having renounced probate, Bury Hutchinson alone acted as trustee and alone proved the will. A part of the testator's estate consisted of property which had belonged to his deceased son John, and partly of a debt supposed to be owing to John from the Rajah of Travancore.

[*279] *In November, 1809, Bury Hutchinson filed his bill, to have the trusts of his father's will executed under the decree of this court, and in 1810, some dispute having taken place between Bury Hutchinson and Bunce Curling, respecting a claim made by Bury Hutchinson against Bunce Curling, on account of the testator's estate, a bill was filed by Bunce Curling and Harriet his wife, and by his children, for an account of the testator's estate. The two suits were both of them pending at the same time, but neither of them was actively prosecuted, and neither of them was ever brought to a hearing. The bill of the Curlings prayed an injunction, (which was obtained,) to restrain the executor from prosecuting any action for the recovery of the demand alleged to be due from Curling ; and in the year 1817, after the answers had been put in, it was alleged that the matters in difference had been accommodated ; and thereupon, and on a motion made on behalf of the plaintiffs, it was ordered that the plaintiffs bill should stand dismissed, with costs to be taxed as between solicitor and client, except the costs of the plaintiffs, which were to be taxed as between party and party ; and the costs when taxed were to be paid, as to one-fifth part thereof, by Bury Hutchinson, and another fifth out of the funds set apart to answer the shares of each of the four daughters ; and in this order, notwithstanding the dismissal of the bill, an order was made respecting the claim against Bunce Curling and his claim for a set-off and directions were given to ascertain the amount due.

It appeared, that notwithstanding the pendency of the suits, Mr. Bury Hutchinson made considerable investments for the benefit of his sisters in respect of their share of the testator's estate ; and that about the end of the year

1820 the testator's estate and the parties to the suit were so circum-
[*280] stanced, that if the *suit was to be prosecuted, it had become necessary

(a) See *Hutchinson v. Townsend*, 2 Keen, 675.

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to file a supplemental bill, and some of the parties had become desirous that the bill should be dismissed; and a letter was read by the plaintiffs, which appeared to have been written and addressed by Mr. Bury Hutchinson to a party interested in the accounts, though to whom did not appear: it was dated the 2d December, 1820, and was to the following effect.

“Sir: A draft of supplemental bill, stating the facts that have transpired since the last bill in this cause, being now ready and about to be filed, that no misconception may arise in your mind as to the suit being dismissed, according to the request contained in your letter of the 24th ult., I have thought it right to repeat what I have before stated to Mr. Cathcart, that the suit can only be dismissed by the parties who are in this country and the attorneys of those abroad signing the accounts, and entering into an agreement in confirmation thereof and as to the terms of the dismissal of the suit.

I am, &c., *Bury Hutchinson.*”

The Mr. Cathcart mentioned in this letter was a person who was stated to have been employed by the parties who signed a memorandum in the account book, and to have been employed for some weeks in the investigation of the accounts. The suggestion as to the dismissal of the bill was not then acted upon, but the accounts having been examined, an entry was made on the 26th day of February, 1821, in the account book, and was to the following effect:—“We the undersigned, having had free access to the executorship accounts of the estate of the late James Hutchinson, Esq., and having appointed Mr. James How Cathcart, of Chancery Lane, to investigate the same on our behalf, and having received his report thereon, do signify our acquiescence in such *accounts up to the 30th day of November, [*281] 1819, by signing our names hereto, this 26th day of February, 1821.”

This account was signed by Mr. and Mrs. Curling and Mr. and Mrs. Lambert, by John Raymond Snow, and by four other persons of the name of Snow, and who appeared to have been four of the children of Adria Snow, the daughter; it was not signed by Elizabeth Ursula Hutchinson, or by the children of Mrs. Curling.

After a lapse of almost two years from the date of this transaction, the parties appeared to have been again in treaty for a dismissal of the bill; and a letter to Mrs. Curling from Mr. Vines, who was a clerk to Mr. Bury Hutchinson, was produced; it was dated the 27th day of November, 1822, and was to the following effect: “Madam, I am desired by Mr. Hutchinson to acknowledge the receipt of the two letters of the 25th instant, and to forward you a copy of the executorship accounts from the 30th of November, 1819, to Monday last when they were submitted for your examination, which copy is sent herewith. When such accounts shall have been approved and signed by all necessary parties, the bill in chancery dismissed, and proper releases (if requisite) executed, Mr. Hutchinson proposes to apply the sum of 8000*l.* three per cent. reduced bank annuities to the parties entitled, according to their shares and interests under the will of the late James Hutchinson, Esq.

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The sum in the three per cents. reduced has been increased from 6666*l.* 13*s.* 4*d.* to 8000*l.*, by an investment this day of 1071*l.* 13*s.* 4*d.* in the purchase of 1333*l.* 6*s.* 8*d.* of such stock, from the cash in the hands of Messrs. Marryatt, Price & Co., bankers to the estate, by which their balance is reduced to 995*l.* 2*s.* 8*d.*

"As it will be necessary for Mr. Hutchinson to retain a considerable sum under his control for future exigencies, in order to avoid inconvenience and loss to the *parties having life interests, it is his intention from time to time to divide the dividends on the new four per cent. annuities, until the fund shall be required for the purposes of the estate, leaving a small balance in the banker's hands.

"The application of the interest received on the Hatton Hill mortgage, from Mr. James Hutchinson's death to August last, for the purpose of relieving Captain Snow from his embarrassments, was made in conformity with the directions given by the family and acquiesced in by Mr. Hutchinson.

"There not appearing to have been any error in the mode of charging the Wimblington drainage tax, it does not appear to be necessary to incur the expense of submitting any case upon that subject for the opinion of counsel.

I am, &c., *William Vines.*"

This letter was sent on the 27th of November; and it appeared, that on the 30th day of the following month of December, a memorandum to the following effect was entered in the account book. "We the undersigned, having perused and examined with the vouchers the preceding accounts, do find that there is a balance in favor of the estate of the late James Hutchinson, Esq. in the hands of the bankers, Messrs. Marryatt, Price, Kay & Co., of 995*l.* 2*s.* 8*d.*; and that the executors, on the 12th of May, 1820, purchased on account of the said estate 1978*l.* 16*s.* navy five per cent. annuities, (since by the legislature converted into new four per cents.) that on the 30th of July, last he purchased on the same account 6666*l.* 13*s.* 4*d.* three per cent. reduced bank annuities; and on the 27th of November, last 1333*l.* 6*s.* 8*d.*, making together 8000*l.* reduced annuities; and we further find that the foregoing accounts do comprise the whole of the estate and effects of the said

James Hutchinson which have come to the hands of his executor [*283] "to the present time; and we acknowledge the said sum of 995*l.* 2*s.* 8*d.* and the said bank annuities to be correct, and do now constitute the whole produce of the real and personal estate of the said James Hutchinson received by the said executor and unapplied. Dated this 30th of December, 1822.

This account was signed by Mr. and Mrs. Curling, by Mr. and Mrs. Lambert, by the plaintiff James Bunce Curling, and by two of the Snows, and Elizabeth Harriet Pike, also one of the family of Snow. On the 13th of January, 1823, Mr. Bury Hutchinson divided the 8000*l.* in the manner proposed in the letter of Mr. Vines, and on the 20th of the same month the bill

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in *Hutchinson v. Hutchinson* was dismissed. For about twelve years all parties appeared to have acquiesced in this transaction ; and before the present bill was filed in January, 1835, several successive changes took place in the representation of the testator James Hutchinson : Bury Hutchinson, the son of James, died in October, 1824, and, after a contest in the Ecclesiastical Court, his widow, Esther Maria Hutchinson, became the representative : she died about February, 1826, and soon afterwards Bury Hutchinson, the grandson, became the representative of James ; and after his death in November, 1834, his widow, the defendant Catherine Margaret Irene Hutchinson, became the representative of James, after three intermediate representations as to the estate of James, and after four intermediate representations as to John, the son of James ; the realization of which, appeared to have been the principle cause of the delay in settling the accounts of the estate of James.

The cause now came on for hearing.

Mr. *Tinney* and Mr. *Girdlestone*, for the plaintiffs, contended that they were entitled to a general account and administration of the testator's estate.

*Mr. *Pemberton* and Mr. *Wilbraham*, for Catherine Margaret [*284] Irene Hutchinson, contended that the accounts ought not to be carried further back than the settlement in December, 1822, insisting, first, that the accounts prior to December, 1822, could not be disturbed without impeaching the orders pronounced by the court, and which could not be done in this suit, which did not seek to impeach them.

Secondly, that, independently of those orders, all the accounts had been settled by the parties, all of whom were competent to bind themselves, except one who had, by subsequent acquiescence, concluded himself from complaining.

Thirdly, that if one only of the parties complainant was bound by the accounts, and it was not disputed that one was, then, such party being disqualified to impeach the settlement of accounts, no relief could in that respect be given in a suit in which he was a co-plaintiff.

Mr. *Kindersley*, Mr. *Cooper*, Mr. *Treslove*, Mr. *Blennan*, Mr. *Wray*, Mr. *G. Turner*, Mr. *Messiter*, Mr. *T. G. Hall*, Mr. *Bellamy* and Mr. *Edward Teed*, for other defendants.

On the point of misjoinder, the following cases were cited : *King of Spain v. Machado*, (a) *Wilkinson v. Parry*, (b) *Harrington v. Long*, (c) *Glyn v. Soares*, (d) *Storey v. Johnson*. (e)

On the question of laches, *Champion v. Rigby*, (g) *Gregory v. Gregory*, (h) were cited.

*May 7.—THE MASTER OF THE ROLLS:—As the plaintiffs [*285] are interested in the estate, and as Mr. Hutchinson, the legal

(a) 4 Russ. 225.

(b) Id. 272.

(c) 2 Myl. & K. 590.

(d) 3 Myl. & K. 450.

(e) 2 Younge & Coll. 586.

(g) 1 Russ. & M. 539.

(h) Coop. 201.

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personal representative, admits that the estate has not been fully administered, it is clear that some account must be taken. [His Lordship, having adverted to the order of 1817, dismissing the bill, proceeded.] At the time when this order was made, the two sons of Mrs. Curling were infants; and, although it may have been and probably was made in pursuance of an arrangement beneficial to all parties, it does not appear to me to be so expressed, and made under such circumstances, as to preclude the infants from their rights to have the accounts taken under the decree of the court. [His Lordship here went through the facts of the case, and proceeded thus.] The question is, whether the settlement of December, 1822, followed by the transfer of stock and the dismissal of the bill, is to be considered as binding upon the Curlings and the Lamberts who signed it, and who are now the complainants; and if binding upon them or any of them, whether they are entitled to complain, in conjunction with Henry Curling, who was an infant at the time, and did not sign.

At the time when the plaintiffs Nutty Lambert and Harriet Curling signed the accounts, their husbands were living, but they were entitled to their shares of the testator's estate for their separate uses for life, with remainder to their children. Nutty Lambert had no child, and in the event of her dying without a child, her share was to go over in such a manner as to give to the children of Mrs. Curling an interest in a share of it. Mrs. Curling had two children, the plaintiff, James Bunce Curling and Henry Curling: Henry Curling was not of age and did not sign; James Bunce Curling was twenty-two years of age, and there is nothing to show that he was not in [*286] *every respect competent to protect his own interest: and, considering the transaction of December, 1822, as an agreement entered into for the purpose of putting an end to the suit and effecting an arrangement for the common benefit of the family, that the parties had immediately the benefit of it—had the transfer of their shares of the 8000*l.*, and had the suit dismissed, and this after an examination of the accounts, I am of opinion that James Bunce Curling, if he had sued alone, could not have set aside that settlement without making out a case very different from that which is now attempted; [1] and such being my opinion, and the fact being that Henry Curling was an infant, it seems scarcely necessary to consider how far Mrs. Lambert and Mrs. Curling were bound in respect of the life estates settled to their separate uses; the question as to the constitution of the suit arises upon the cases of the plaintiffs James Bunce Curling and Henry Curling.

There are cases, in which notwithstanding a misjoinder of plaintiffs, the court has permitted a decree to be made at the hearing. It has been done when it has appeared that justice could be done to all parties, notwithstand-

[1] Vide, *Pickering v. Pickering*, 2 Beav. 31. *Chappedelaine v. Dechenaux*, 4 Cranch, 116. *Farnam v. Brooks*, 9 Pick. 212. *Philips v. Beldon*, 2 Edw. Ch. Rep. 1, 17. 1 Story's Eq. § 523. Paley, Pr. & Ag. 52, and notes of Amer. Ed. *ibid.*

 1838.—Westhead v. Keene.

ing the misjoinder ;[1] but Henry Curling who might be entitled to sustain a bill alone, is here seeking relief for himself and others, alleging that those others have been defrauded, and asking relief for them and himself, not on the grounds on which he might himself be entitled to it, but on grounds which are advanced by them, and on evidence which appears to me to be insufficient ; and under these circumstances, I think, that on this bill Henry Curling is not entitled to more than the account to which James Bunce Curling is entitled.

Decree therefore the usual accounts on the footing of the account made up and stated on the 30th December, 1822.

*Dismiss with costs so much of the bill as seeks for a declaration, [*287] that the plaintiffs are not bound by the compromise and settlement of accounts which then took place, and for an account up to that time.

WESTHEAD v. KEENE.

1838: December 3.

A bill filed by a patentee, to restrain the piracy of his patent and for an account, did not distinctly state the specification, or explain the nature of the invention for which the patent right was claimed ; but it alleged that the specification was duly enrolled and that the drawings and description in the specification could not be set out in the bill, and it charged that the plaintiff was the inventor and that the invention was new : the court (not without some doubt) held, on the authority of *Kay v. Marshall*, that the bill was not demurrable.

THE bill stated that his late Majesty King William IV., by letters patent dated the 16th of February, 1836, granted to the plaintiff, his executors, &c., during the term of fourteen years, the sole privilege to make, use and vend a certain invention, being "an improved method of cutting caoutchouc or India rubber, leather, hides and similar substances, so as to render them applicable to various useful purposes ;" his Majesty thereby commanding, that no one should, during the said term, either directly or indirectly, use the said invention ; that the letters patent contained a proviso, that the said letters patent should not become vested in more than twelve persons at any one time as partners ; and also a proviso requiring the specification of the letters patent to be enrolled within six months. That, in compliance with such proviso, the plaintiff did particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, dated the 10th day of August, 1836, explaining therein the aforesaid particulars, *by drawings and a description thereof which*, the bill alleged, *could not be set out in the plaintiff's bill* ; and did enrol the said instrument or specification in the High

[1] Vide, 1 Sim. & Stu. 118, n. 1. 4 Russ. 241, n. 1.

1838.—Westhead v. Keene.

Court of Chancery, on the 16th of August, 1836, within the six months for that purpose in the said letters appointed.

[*288] *The only description of the invention contained in the bill was in the following passage, "That in the said specification were the words following :—Now, although the machine which I have above described answers the intended purpose of enabling me to carry into effect my improved method of cutting caoutchouc or India rubber, leather, hides and similar substances, so as to render them applicable to various useful purposes, I am fully aware that the same may be variously modified ; as for instance, instead of imparting a rectilinear or progressive movement, as well as a rotatory motion to a piece of caoutchouc or India rubber, leather, hides or similar substances intended to be cut into fillets, a revolving motion only may be imparted ; and by causing the pedestal or bearings, upon which the revolving cutters work, to be fixed upon or attached to a sliding carriage and made to advance in the direction of the material to be operated upon, a similar effect may be produced, and the caoutchouc, leather, hides or other similar substance, may be cut into fillets or tapes of the required thickness. It is also obvious, that instead of using revolving or circular cutters, longitudinal or straight knives or cutters may be applied, to which rapid reciprocating motion may be given, for the purpose of cutting the caoutchouc, hides and similar substances into fillets. The position of the various motions and parts of the machinery for the accomplishment of my method of cutting the materials may also be considerably varied, if required, and rendered more completely self-acting and independent of the operative or attendant ; but as one great advantage arising from the adoption of my improved method, is that of cutting pieces of material of irregular shape and size, the adjustments of which must always depend on the judgment of the operator, I have considered it best to have the machine also greatly dependent on his or her

[*289] attention ; I therefore wish it to be understood, that I claim *as my invention, not only the machine hereinbefore described, but also any modification of such machine by which my improved method of cutting caoutchouc or India rubber, hides and similar substances into a band, tape or fillet, by means of a revolving or other cutter, acting on the exterior edge of such materials, and regularly cutting the same in a spiral or helical direction towards the centre, can or may be effected. But for greater certainty as to the words, figures, drawings, contents and purport of the said letters patent, and specification, the plaintiff craves leave to refer thereto as to the enrolment, exemplification or other copies thereof respectively, when produced to the honorable court, and to the same extent, as if the said letters and specification had been in this bill fully set out."

The bill further stated, that the plaintiff, about the date of the letters patent, constructed two machines according to the said invention and specification, and used the same on his own account, and applied such machines to cut after an improved manner, caoutchouc or India rubber, hides and other similar

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substances, so as to be applicable to various useful purposes, and in particular to cut the aforesaid materials from the shape of a flat disk or solid piece into continuous fillets. It further stated that the defendants Charles Keene and Christopher Nickels had infringed the patent; and it charged "that plaintiff was the first discoverer and deviser of the said invention; and that at the respective times of such discovery, and of plaintiff's application for, and of the grant of the said letters, the said invention was new as to the public use thereof, and was unknown, and was then and was now, highly useful and beneficial to the public." That an act of parliament was passed on the 15th of July, 1837, intituled, "An act for forming and regulating the London Caoutchouc Company, and to enable the said company *to [*290] purchase certain letters patent, whereby a company, called 'The London Caoutchouc Company,' was established:" and it was thereby enacted that all contracts entered into on behalf of the company should be in writing, and signed by three directors, or by the agent of the company duly authorized; and the company were empowered to purchase, and the plaintiffs to sell said patent; that prior to the passing of the act, and in November, 1836, verbal negotiations had taken place between the plaintiff and the company, for the sale of the said letters patent, but no written contract regarding the same had been signed by or on behalf of the company, and no assignment had been executed by the plaintiff; but nevertheless, under the circumstances aforesaid, the company claimed some equitable interest in the patent and in the privileges thereby secured. The bill charged, that the principle of construction and mode of application of the said machine, constructed and used by the said defendants, Keene and Nickels, was precisely the same as the machines invented and constructed by the plaintiff.

The bill prayed an account of the profits made by Keene and Nickels by making, using, exercising and vending the said invention and machines, and by manufacturing and vending the articles and things aforesaid; and that they might be restrained from making, using, exercising and vending the said invention, machines, articles and things, and in particular, from using the said machine in their manufactory.

To this bill the defendants, Keene and Nickels, filed a demurrer; first, generally, for want of equity; secondly, that the bill was exhibited against these defendants and divers other persons as defendants thereto, for several and distinct matters, which had no relation *to each other, [*291] and in parts whereof Keene and Nickels were in no way interested or concerned, and ought not to be implicated; thirdly, that all the discovery and relief sought by the bill was so sought in respect to certain letters patent alleged to have been granted to the said complainant, as in the said bill stated; whereas it appeared from the statement in the bill of the said letters patent, and of the specification, in the bill alleged to have been enrolled in compliance with the proviso in that behalf contained in the letters patent, that the patent was wholly invalid; and that the same afforded no sufficient ground for any dis-

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covery or relief against the demurring parties in this court; fourthly, that the bill contained in itself parties who have no relation to or dependence on each other, whereby the said bill is drawn to unnecessary length, and Keene and Nickels, if they should be compelled to make answer thereunto, would be put to unnecessary expense, delay and trouble, contrary to the constant practice of the court; fifthly, that the bill contained in itself parties, who by the plaintiff's own showing on the face of the bill, had no interest whatever in the subject matter of this suit, and were, therefore, improperly made parties thereto, whereby the said bill was drawn to unnecessary length, and they, the defendants, if compelled to make answer thereunto, would be put to unnecessary expense, delay and trouble, contrary to the constant practice of this honorable court; wherefore, &c., they demurred, &c.

Mr. *Tinney* and Mr. *Dixon*, in support of the demurrer, contended that the plaintiff was bound distinctly to state his title on the face of his bill, and what it was he laid claim to; that in a case of patent, it was incumbent on him to set out the specification at length, in order to enable the [*292] court to judge of its validity; that, *so far as the invention was set out in this bill, the patent appeared invalid; for a patentee was bound by his specification to afford full and precise information, *The King v. Wheeler*; (a) it should be such as to enable a mechanic to make the thing described, *Hornblower v. Boulton*; (b) and should be intelligible to a person of ordinary skill, *Hill v. Thompson*; (c) *Sturz v. De La Rue*; (d) it should not be too general or cover too much, *Lord Cochrane v. Smethurst*; (e) and the invention should be new in all its parts, *Brunton v. Hawkes*; (g) and that the patent as described in this case wanted all these qualifications.[1]

They contended that the company had been improperly joined as defendants to this suit; that it was stated in the bill that the act of parliament required that all contracts entered into by the company must be in writing, and here it was admitted that no written contract had ever been entered into by them, and that consequently they had no interest in the matters of this suit. That questions might arise in this suit as to the validity of the contract, with respect to which Keene and Nickels had no concern, and therefore there was a mis-joinder of defendants; they cited also *Ward v. Duke of Northumberland*, (h) *Campbell v. Mackay*. (i)

Mr. *Pemberton*, and Mr. *Torriano*, contra, contended that a general description of the invention was sufficient, and that it was not necessary in such a bill as the present, to set out the whole of the specification of a patent; *Kay v. Marshall*. (k)

(a) 2 B. & Ald. 345.

(b) 8 Term Rep. 98.

(c) 3 Mer. 622.

(d) 5 Russ. 322.

(e) 1 Stark. 205.

(g) 4 B. & Ald. 541.

(h) 2 Anst. 469.

(i) 1 Myl. & C. 603. [S. C. 7 Sim. 564]

(k) 1 Myl. & Cr. 373

[1] Vide *Isaacs v. Cooper*, 4 Wash. C. C. Rep. 259. *Barratt v. Jewett*, 2 Paige, 134. *Wyeth Stone*, 1 Story's Rep 273.

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"That the plaintiff on the face of his bill had alleged, as in the case [*293] of *Kay v. Marshall*, that he had by his specification done all that his patent required him to do, namely, had described and ascertained the nature of the invention, and in what manner the same was to be performed; that the bill also contained an allegation that the drawings could not be set out on the bill and a charge as to the novelty and utility of the invention; that a general demurrer, which admitted all these statements to be true, could not be sustained; and that it was neither usual nor convenient to determine the validity of a patent on demurrer.

On the second point, they contended that the company were interested in the accounts which were prayed by the bill, and had therefore properly been made parties, besides which the objection of misjoinder did not apply to co-defendants.

THE MASTER OF THE ROLLS:—When I read over this bill and demurrer, which I did before I came into court, it certainly struck me that both of them were somewhat remarkable: that the bill was extremely remarkable for its vagueness and uncertainty, the statement of the title of the plaintiff not being, as I think, distinctly set forth, and the demurrer, as it seemed to me being equally remarkable, being expressed in an unnecessarily complicated form.

I had certainly understood that in a bill of this nature, when the protection of a Court of Equity was asked to defend the right claimed by a plaintiff under a patent, it was necessary for him to set forth his title in such a way, as to enable the court, from the statement on the record, to form an opinion whether the title was good or bad. This bill does not do so, for it [*294] does not set forth on the record the specification, which is necessary to enable any one to consider whether the patent is valid or not. Upon looking, however, at the case of *Kay v. Marshall*, I think that I must necessarily come to the conclusion, that the court did not, in that case, consider it necessary for the plaintiff to set forth on his bill, the full statement of his specification; but that if he alleged that he had done that which was required by the proviso in his patent, the court would give credit to such an allegation on the argument of a demurrer.

Now, if that be so, and after the decision in *Kay v. Marshall*, whatever my own opinion might be, I am bound, sitting in this place, so to consider it; then here we have the allegation upon the record which was contained in the case of *Kay v. Marshall*, and we have, in addition, certain words which were contained in the instrument of specification, which the court is to construe, not of themselves, but with relation to those which are omitted; that is, we have certain relative words, and the co-relative words are not here. I own, in the absence of that authority, I should not have thought that a correct mode of pleading. I should have thought that there ought to be, on the record itself, sufficient to enable the court to come to a conclusion; but if it has been decided that credit is to be given to the allegation of the plaintiff

1838.—Westhead v. Keen*.

which is on the record, I must, of necessity, take it in this case, that the words which are on the record, having to be construed in relation to those words in respect of which I am to give credit to the allegations contained in the bill, amount to something sufficient to sustain the equity of this case. That being the case, I do not know how I can depart from the decision, and on [*295] that ground I must support the bill; *but I do this in submission to what I conceive to be the authority of *Kay v. Marshall*, having certainly before been of opinion, that it was the duty of a plaintiff to state distinctly on the record, those circumstances which were necessary to sustain his title, and not to do it by mere reference to an instrument, of which the most material part is not set forth.

The other ground of demurrer is with respect to the misjoinder of the parties.

Now, undoubtedly, there may be a misjoinder of defendants, but I do not think I can so consider it in this case, because, what does it amount to here? This bill prays for an account of the profits which have been made by the defendant from the use of the plaintiff's patent: the allegation is, that other persons claim an interest in those letters patent, and if so, they would be entitled to an interest in that for which the plaintiff is here calling the defendant to account. This is not a bill for a specific performance of an agreement. I do not find anything of that sort as against the other defendants; but it is a bill which calls the other defendants into the presence of the defendants who are now demurring, in order that they may not be compelled to account twice, first to the plaintiff, and then to the other defendants who claim an interest; and this is a sort of joinder of defendants, which is, of necessity, made in obedience to the rule, which requires that all persons interested ought to be before the court.[1]

I think, therefore, I cannot allow this demurrer, at the same time I think this demurrer shows a very good *prima facie* case; and I should have had very great doubt as to the validity of this patent, judging alone from [*296] what appears on the record: I think, *therefore, I must not give the costs of this demurrer as I did of the last.

I cannot entertain any doubt respecting the rule on the discussions of demurrers, that you cannot go beyond the record; if you have any defence that is not on the record, you must bring it forward by another mode. The defendants might have pleaded the whole of this specification, and might have shown on that plea, that the plaintiffs were not entitled to relief. The defendants might have put it forward in their answer; or if they desired to have the matter brought forward in a shorter form, then, if the other grounds would admit of it, they might have put in a short answer, saying, "I admit

[1] Vide *Gaines v. Chew*, 2 Howard, 619, 642. *The Attorney General v. The Mayor &c. of Poole*, 4 Myl. & Cr. 17. *Varick v. Smith*, 5 Paige, 160. 3 Myl. & Cr. 97, n. 1. 10 Sim. 315, n. 1.

1838.—Grove v. Sansom.

you did take out such a patent and put in such a specification, I admit I have used this machine from March, 1836, but I deny your right."

Demurrer overruled.(a)

*GROVE v. SANSOM.

[*297]

1838: November 15.

An order of course for taxation cannot be supported on merits as a special order, upon the occasion of a motion to discharge it.

Whether the taxation, at the instance of a *cestuique trust*, of a bill of costs which has been long since settled and paid by trustees out of a trust fund, ought to take place as against the solicitor, or as against the trustees for the purpose of justifying their payment, *quere*.

On the 16th of March, 1833, the respondents, New and Humphries, who were the executors of Elizabeth Grove, deceased, obtained the common *ex parte* order for the taxation of the bill of costs of Mr. Wright, a solicitor, on the allegation that he had been employed as solicitor for Elizabeth Grove, and by the petitioners, her executors, and on the usual undertaking to pay what shall be found due.

It was now moved, on the behalf of Mr. Wright, to discharge this order for irregularity. The application was supported by an affidavit, which showed, that in 1829, Mr. Wright, the solicitor, had delivered his seven bills of costs against the testatrix and her executors, amounting to 746*l.* 7*s.* 8*d.*, which, after examination and discussion, and after the deduction, amounting to about 39*l.*, were paid by the executors, with the concurrence of the tenants for life of the testatrix's property; that, in 1830, a further bill of costs was delivered, which, after a small deduction, was paid in February, 1830, with the like concurrence; that two other bills were delivered in June and December, 1830, which were also paid; that he, Wright, had delivered up all papers which were considered of any value, or which had been required.

By the decree in a cause of New and another against Farman, it was,

(a) As to demurrers for uncertainty, see Cooper's Eq. Plead. 181; *Gell v. Hayward*, 1 Vern. 312; *Crosseing v. Honor*, ib. 180; *Lord Uxbridge v. Staveland*, 1 Ves. sen. 55; *East India Company v. Henckman*, 1 Ves. jun. 287; *Cresset v. Mitton*, 1 Ves. jun. 448. S. C. 3 B. C. C. 481; *Ryves v. Ryves*, 3 Ves. 343; *Kemp v. Pryor*, 7 Ves. 237; *The Mayor of London v. Levy*, 8 Ves. 398; *Jones v. Jones*, 3 Mer. 161; *Frietas v. Dos Santos*, 1 Y. & J. 574; *Jones v. Maund*, 3 Y. & Col. 347; and *Baker v. Harwood*, 7 Simons, 375. [The bill alleged that there were certain dealings and transactions between the bankrupt and defendant; that by virtue of certain agreements for leases, the bankrupt was possessed, &c.; that the defendant made certain loans to the bankrupt, &c. There was a general demurrer, on the ground that "the plaintiffs had not by the bill stated any certain case" for relief in equity. The demurrer was allowed; the Master of the Rolls intimating, "that he did not see how a bill, the statements of which were so vague and uncertain, could be supported." *Wormald v. De Lisle*, 3 Beav. 18. It is somewhere observed by a learned judge, in deciding a question of common law pleading, that the word "certain," was one of the most uncertain in the language.]

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amongst other things, ordered, that the defendants (who were interested under the testatrix's will) should be at liberty to obtain, in the name of [*298] the plaintiffs, New and Humphries, an order for the taxation of Mr. Wright's bill of costs; the plaintiff to be indemnified out of the funds in the cause. Mr. Wright was not a party to the cause.

These were the bills of costs sought to be taxed, and which, Mr. Wright being unable from illness to attend, after obtaining the order for taxation, the parties proceeded to tax *ex parte*.

Mr. *Pemberton* and Mr. *Smythe* now moved to discharge the order for taxation for irregularity; contending, that the bills having been settled, the parties ought to have applied to the court for a special order for their taxation; and that, under the present practice, the court would not enter into the circumstances of the case in order to determine whether the order could be now supported on the merits.

Mr. *J. Russell*, *contra*, contended that the solicitor, having obtained payment of his bills by a trustee out of a trust fund, could not set up that payment to prevent a taxation of his bill, especially where, as in this case, married women and infants were interested, that the order for taxation was therefore right: he relied on *Hazard v. Lane*,^(a) where Lord Eldon held "that a solicitor could not be allowed to interpose, the payment of his bill of costs, by a person in the situation of a trustee, between himself and the parties (*cestuisque trust*) for whom he was at the time aware that the person who paid him was no more than a trustee, as, there, an executor acting for the parties beneficially interested under the will." In that case the common order for taxation had been obtained, which Lord Eldon, on hearing the merits, refused to discharge.

[*299] . *Secondly, he insisted that where a party complains of a technical irregularity, he must apply at the first moment; and that, in this case, such *laches* existed as ought to induce the court to refuse its interference.

THE MASTER OF THE ROLLS:—In this case there are two questions, first, if the order of course for taxation is regular; and if not, then if there have been such *laches* and acquiescence on the part of the solicitor as precludes the court interfering to grant him the relief asked. As to the merits of the case, I have no concern on the present occasion; it may be reasonable that a solicitor receiving costs out of trust property, and being in the situation of solicitor to the trustees, should have his bill taxed, notwithstanding it has been settled with the trustees; but it may be a question, whether the taxation is to be as against the solicitor or as against the trustees for the purpose of justifying their payments to him. On this occasion, however, it is not necessary to consider that point.

Wright, it appears, was employed as solicitor for the trustees, and a settlement was had of the bills of costs due, and which were subjected to the con-

(a) 3 Mer. 291.

1839.—Dawson v. Yates.

sideration of the trustees and of some of the parties interested, and after consideration were paid ; some of them were paid ten years ago, and the papers were delivered up. After this transaction, an order for taxation was obtained on this allegation, "that Elizabeth Grove employed Mr. Wright as solicitor, and that the petitioners have continued to employ him ;" but wholly omitting all notice of the transactions which had taken place,—that the bills were settled, and the papers delivered up. I am of opinion that an order of course obtained on this statement, wholly omitting so material an allegation, is an irregular order.

*It has been the practice in this court, on applications of this sort [*300] being made to discharge an order of course, that although it might appear that the order was irregularly obtained, or that the suggestions were not such as they ought to be, yet if it appeared on the merits that an order for taxation ought to be made, the court, arranging the costs, has sustained the order sought to be discharged. This practice has been over and over again acted on, but the propriety of it has been considered by the Lord Chancellor, and he has altered the rule. I entirely approve of the alteration, it makes parties more careful in obtaining these orders, and considerable inconvenience has occurred from the contrary practice.

His Lordship said he considered that there had not been such *laches* or acquiescence as to prevent his interference, and he discharged the order for taxation, with costs ; saying, however, that he made this order without in the least determining, whether, on a proper application being made to the court, the bills could or not be subjected to a taxation.[1]

*DAWSON v. YATES.

[*301]

1839 ; November 8.

An agreement was entered into by A. for the sale of an estate to B., to be completed and the purchase money paid on or before the expiration of five years, and in the mean time interest on the purchase money was to be paid half yearly by the purchaser ; the vendor reserved a right of avoiding the contract in case the interest should be in arrear for twenty-one days.

To enable B. to pay the interest then in arrear, C. advanced a sum of money on mortgage of B.'s interest in the property, and the vendor afterwards verbally agreed with C. to extend the term for the payment of the half yearly interest. The interest became afterwards in arrear in such a way that A., by the original agreement had a right to annul the contract but he had no such right under the varied agreement : A re-entered as for a forfeiture. The court, on the application of C., appointed a receiver over the property.

Where facts, not founded on allegations in the bill, are introduced into affidavits in support of an application for a receiver, the court will disregard them, and a defendant acts properly in not answering them.

THIS was a motion for a receiver upon affidavits and before answer, under the following circumstances :—

[1] If an order for taxation of costs is obtained of course, in a case in which it ought to have been obtained upon special application, it will be discharged, although it might be a proper case in which an order should be made. *Harris v. Start*, 4 Myl. & Cr. 261.

1839.—*Dawson v. Yates.*

By articles of agreement, dated the 17th of January, 1835, and made between Yates of the one part, and Wilson of the other part, Yates agreed to sell to Wilson, for the sum of 3900*l.*, some property over which Yates, as mortgagee, had a power of sale; and it was thereby agreed, that the purchase should be completed and the purchase money paid on or before the 1st of June, 1840, when a conveyance was to be executed; and that until the purchase should be completed, Wilson should pay or allow, out of the rents and profits arising from the land and premises, unto Yates, interest at the rate of five per cent. per annum upon the amount of the aforesaid purchase money or sum of 3900*l.*; and it was provided and agreed, that if the interest from time to time to become due on the sum of 3900*l.* during the term of five years from the date of the agreement, or any part thereof should happen to be in arrear and unpaid for the space of twenty-one days after the half yearly days on which the same ought to be paid (being the 17th [*302] of July, and the 17th of January, in each and every year,) "then and in such case it should and might be lawful for Yates to re-enter into and upon the hereditaments and premises, and the same to have again, repossess and enjoy as in his former estate; and from and after such re-entry made, the agreement and every clause, matter and thing therein contained should become absolutely void to all intents and purposes.

Wilson at the same time gave to Yates a warrant of attorney, authorizing him, on default of payment of the principal money and interest at the times by the contract agreed to be paid, to enter up judgment in ejectment against him.

In the month of June, 1836, the interest being then in arrear, Wilson was desirous of borrowing money for the purpose of satisfying such arrear of interest, and he applied to Dawson for a loan to enable him to do so: Dawson assented, and in June, 1836, Wilson conveyed his interest in the estate to Dawson, the plaintiff, as a security for money then advanced by him to Wilson, for the purpose, amongst other things, of enabling him to pay the interest: the sum advanced was 400*l.*, the interest which was then due being the sum of 195*l.* only.

Dawson paid to Yates the whole of the interest up to the 17th of January, 1836, and Yates (as it appeared to the court from the effect of the affidavits) subsequently, by parol, agreed with Wilson to waive the strict terms of the agreement of 1835, as to the payment of the interest, and consented to accept it half yearly, six months later than it would have become payable under the original agreement: by these means the half yearly interest, which under the original agreement became due in June, 1836, [*303] did not, under the new arrangement "and understanding between the parties, become payable until January, 1837.

Yates, in April, 1837, there being then (as was alleged by the bill) no sum of money for principal or interest due and owing to him under the new agreement, entered up judgment in ejectment under the warrant of attorney,

1839.—Dawson v. Yates.

and by virtue of such judgment, in April, 1837, re-entered upon the property, in order to annul the agreement of 1835. The bill prayed for redemption or foreclosure, for the specific performance of the agreement between Yates and Wilson, and for a receiver.

It appeared from the affidavits, that one Fisher was in the receipt of the rents, and that he was agent for both Dawson and Yates, and that the rents were to be applied in keeping down the interest on the purchase money. In January, 1837, Fisher had received a sum of 98*l.* from the tenants, and the interest due at that time amounted to 97*l.* 10*s.* only.

Mr. *Pemberton* and Mr. *Martindale*, on behalf of the plaintiff, now moved for the appointment of a receiver over the property.

Mr. *Kindersley* and Mr. *Wright*, contra.

The principal points discussed were whether in April, 1837, when Yates took possession, there was any arrear of interest according to the agreement as modified by the subsequent arrangement between the plaintiff and defendant; and whether there had been any waiver, on the part of Yates, of his rights under the original agreement which bound him.

*THE MASTER OF THE ROLLS, in adverting to the circumstances [*304] of the case, said, Fisher was the common agent, on the one hand, of Yates, who was, in one sense, the mortgagee, or the person entitled to the 3900*l.* and interest, and on the other hand, he was the agent of Wilson to receive the rent, and out of the rent to pay the interest as it became due. I think it is not disputed, that Mr. Yates verbally consented to afford the plaintiff the indulgence he was asked, and on that understanding the 195*l.*, which was due for interest up to January, 1836, was paid. By the clear understanding between the parties, there was to be half a year's indulgence given; and by the transactions which took place between the parties and their common agent Fisher, it is clear, that the rent to be received by Fisher was to be paid in satisfaction of the interest, as it became due. The interest next payable, amounting to 97*l.* 10*s.* became, according to the new understanding between the parties, payable on the 17th of January, 1837, and the rents received by Fisher up to that time, are stated to have amounted to 98*l.*; and unless there are circumstances to show that the nature of the transaction between the parties was varied, so as to prevent the rent being applicable to the payment of the interest, the interest was in point of fact paid. With the rent actually paid up to that time—with the communication which appears to have taken place between the parties, Yates takes advantage of a warrant of attorney which he had, enters up judgment, and immediately takes possession; not because there was any arrear of interest due to him, but under the proviso of re-entry in the contract with Wilson, and by these means he puts an end to the interest of the plaintiff. I cannot think that this was a proper course of proceeding; or such as the court would allow if the facts were made out *at the hearing; the question now is only, whe- [*305] ther the property ought to be secured in the mean while, and it ap-

1839.—*Dawson v. Yates.*

pears to me that it ought. I think there is a sufficient statement in the affidavit of Fisher, which is in no way explained, that the interest had in point of fact been paid, at the time when it became payable according to the new contract between the parties, and that on the understanding which existed between the plaintiff and Yates, the latter was not authorized to put an end to the transaction of 1835 altogether.

Order for a receiver granted, and by consent,
Yates to have liberty to propose himself.

The affidavit of Dawson the plaintiff, in support of the motion, stated, that in June, 1837, he called on Yates, and had a long conversation with him generally as to the premises, when Yates stated, that he wished the plaintiff to go and see Mr. Fisher, whom he would also see, and talk the matter over; that the plaintiff saw Mr. Fisher, who refused to let him know the state of the accounts, although deponent said, that in order to protect himself, he was willing to pay any deficiency, if the agent would furnish him with the accounts.

There was no such allegation as this in the bill, but there was a general statement, that the plaintiff had frequently offered to pay the defendant Yates the principal sum of 3900*l.*, with all interest due thereon; such offer was not stated to have been made before Yates took possession. The statement in the affidavit was, however, relied on in support of the motion.

Mr. *Kindersley*, during his argument, had contended, that the plaintiff could not rely on any statement which had not been expressly charged or alleged in the bill, and consequently that this part of the evidence [*306] ought to be rejected; he added, that the defendant had been advised not to answer this part of the affidavit at all.

Mr. *Pemberton*, contra, contended, that the general charge in the bill, of the plaintiff's offers to pay, was sufficient to entitle the plaintiff to the benefit of the above statement in his affidavit.

THE MASTER OF THE ROLLS, on this point said, I have not adverted to the other circumstances which are not alleged in the bill: I think that those who advised the defendants in this case not to answer the allegations set forth in the affidavits and not in the bill, and on which an equity was attempted to be raised, acted in that respect with great propriety. It is always to be remembered, that the orders of the court are to be pronounced on that which is alleged in the pleadings between the parties; affidavits and depositions are to be considered only as evidence of the allegations made by the respective parties in proper form, and cannot be attended to as laying a foundation for equities not otherwise alleged or claimed: for that reason I have omitted to take any notice of the statements which are contained in the affidavits and are not alleged on the bill.

1839 — Jones v. James.

*JONES v. JAMES.

[*307]

1839: January 30.

Under the common order for the taxation of costs, the Master is not authorized to take an account of pecuniary matters between the parties, which are foreign to the bill of costs; but *secus* where moneys are paid by the client on account of the bill of costs, or where by agreement between the solicitor and client, the moneys which come to the hands of the solicitor are to be applicable to the payment of the bill of costs.

Under the common order, the Master is not authorized to allow interest on the balances of moneys of the client, from time to time in the hands of the solicitor, though such appears to have been the agreement between the parties.

THIS case came before the court upon petition, by way of exception to the Master's report, made on a reference to him in the common form, to tax the bill of costs of the petitioner Thomas.

It appeared that the respondent Harries had employed the petitioner Thomas as his solicitor in various transactions, but principally in the investment of money on securities; and in the course of which transactions, several sums of money had been received by Thomas on account of Harries.

In April, 1837, Harries obtained the common order for the taxation of Thomas' bills of costs, which stated that Harries had employed Thomas, one of the solicitors of this court, to defend this and other suits and matters, as the petitioner's attorney and solicitor, and that Thomas had delivered unto Harries two several bills of his fees and disbursements; and Harries thereby submitting to pay to Thomas, what should be due to him on the taxation of the said bills, it ordered that it should be referred to the Master to tax the same; and that Harries and Thomas should produce before the Master, upon oath, as he should direct, all books, papers and writings in their custody or power relating to the said bills, or to any of the items or charges therein; and that they should be examined upon interrogatories touching the same, as the said Master should direct; and that upon Harries, pursuant to his submission, paying to *Thomas what should appear to be due to [*308] him on such taxation, or in case the said bills should appear to be already paid, then that Thomas should deliver unto Harries, upon oath, all deeds, papers and writings in his custody or power belonging to Harries; and, if he was overpaid, that he should refund and repay to Harries what the said Master should certify to be overpaid; and that all proceedings at law against Harries, on account of the said bills should be stayed, until the said Master should have made his report.(a)

It appeared, that in 1828, Thomas delivered to Harries an account, in which there was no charge for costs, but interest was charged on the balances from time to time, and in the result there appeared a balance of 256*l.* due from Thomas to Harries.

(a) Thomas attempted unsuccessfully to get this order discharged. See 2 Keen, 184; and see *Harries v. Thomas*, 2 Mee. & W. 32.

1839.—*Jones v. James.*

In February, 1832, Thomas delivered another account to Harries, in which the bills of costs claimed to be due by Thomas from Harries were charged, and which showed a balance of 45*l.* due from Harries to Thomas.

In the examination of Harries on interrogatories before the Master, he stated, that he had not made any payment expressly on account of the said alleged bill of costs; that the said Thomas was employed by him, from the year 1820, and for many years afterwards, as his attorney and solicitor; and that during such time, Thomas received and paid on his account divers sums of money; and that some parts of the moneys which Thomas so received, he retained in his hands, upon an agreement or understanding that [*309] he was to pay or allow to him, *Harries, interest for the same, until such sums should be paid over to him, or be applied to or for the use or on account of him, Harries; and he said, that although he did not remember that he ever entered into any express agreement with Thomas upon the subject, he always understood, and he believed and was confident, that Thomas also understood, and accordingly that there always was an understanding between him and Thomas, that upon settling accounts between him Harries and Thomas, the latter should retain out of the moneys of Harries happening then to be in his Thomas' hands, so much of such moneys, as might be necessary for the purpose of liquidating any fair bill of costs or claim for law charges, that might be due from Harries to Thomas.

This statement was not met nor rebutted on the part of Thomas.

The several sums of money received by Thomas on account of Harries were not received in payment of his bill of costs, but were received generally in the pecuniary transactions in which he was concerned for Harries.

The bill of costs amounted to the sum of 785*l.*, but which, in consequence of all the costs incurred previous to Thomas' admission as an attorney of the superior courts of Westminster being disallowed, were reduced by taxation to 242*l.*

The Master, by his report stated, that during the time Harries employed Thomas as his solicitor, Thomas received and paid divers sums of money on account of Harries; and he found from the evidence before him, that there was an agreement between the parties that Thomas should allow interest on the balances from time to time in his hands, at 5 per cent.; and he [*310] found two *sums of 250*l.* and 50*l.* due from Thomas to Harries, and on which he had calculated interest, and which together amounted to the sum of 379*l.*; from which sum he deducted the amount of the bills of costs as taxed, and having calculated subsequent interest on the balances, he found that Thomas had been overpaid his said bill of fees and disbursements by the sum of 116*l.*

Thomas objected to this finding on two grounds; first, that the Master had no authority under the order of reference to take an account of the money transactions between him and Harries; and secondly, that he was not autho-

1839.—*Jones v James.*

rized to allow interest on the balances of moneys belonging to Harries in the hands of Thomas.

Thomas presented this petition, praying a reference back to the Master to review his report, with a declaration, that he should not give credit to Harries for the sums of 250*l.* and 50*l.*, or for any sums, except sums received by the petitioner expressly on account of his bills of costs, or appropriated with the assent of Harries towards the payment thereof; and that the Master should not allow interest on the balances.

Mr. *Kindersley* and Mr. *James*, in support of the petition, contended, that the meaning both of the order for taxation and of the statute on which it was founded, (a) was this, that on the taxation of the bill, credit should be given for the money paid to the solicitor on account of his bill of costs, and not that the Master should take an account of the pecuniary dealings between the parties; for otherwise, the fact of 6*s.* 8*d.* being due from a client to his solicitor might have the effect of authorizing the Master to take a complicated pecuniary account to an extent of 10,000*l.* and involving the most [*311] intricate questions of law, upon a reference to him to tax this item as a bill of costs; that accounts between a solicitor and client could not be taken on an order for the taxation of a bill; and such was the opinion of Lord Hardwicke. (b)

They relied on the evidence and the conduct of Harries, to show that no such agreement existed as that stated by him; and they contended, that even if true, it amounted to a right of set-off only, and not to payment, and was not sufficient to found the jurisdiction exercised by the Master. They observed that the order at common law was more extensive, as it orders that the attorney "shall give credit for all sums of money, if any, by him received from or on account of the client, and refund what, if any thing, he hath been overpaid." (c) Yet this was in the nature of a special order, obtained upon a rule to show cause.

As to the question of interest, they contended that the Master was in no case authorized to calculate interest, even in the case of a mortgage or legacy, except specially directed: they cited *Berrington v. Phillips*, (d) as showing that interest could not, under similar circumstances, be allowed to a solicitor on taxation.

Mr. *Pemberton* and Mr. *Coleridge*, contra, contended that although every account between a solicitor and his client could not be taken upon a reference for the taxation of costs, as in a case where there were items which had no connection with the relation of solicitor and client, yet that in this case the nature of the transactions and the understanding and agreement between the parties rendered it proper, nay indispensable, that the [*312] Master should enter into the consideration of the receipts of the soli-

(a) 2 G. 2, c. 23, s. 23.

(b) Anon 2 Ves. sen. 452.

(c) Chitty's Forms, 4th ed. 12.

(d) 1 Mee. & W. 48.

1839.—*Jones v. James.*

citor on account of his client ; that there was an order to refund, and that it was necessary to consider the amount received, in order to ascertain the amount to be refunded ; that if it were decided, that these sums of 250*l.* and 50*l.* were not to be set off against the bills of costs, the effect would be this : Thomas would recover from Harries the whole amount of his bills of costs ; and when Harries brought his action against Thomas, to recover these two sums, the latter would defeat this demand by pleading the statute of limitations.

On the question of interest, they contended that the Master had proceeded properly in calculating and allowing it, as it had been clearly made out that such was the agreement between the parties.

THE MASTER OF THE ROLLS :—With respect to the general merits of the case or the former conduct of the parties I have nothing to do with them on this occasion, and I cannot take them into my consideration, for the single question which I have now to decide, is whether the Master has proceeded in conformity with the order of reference, and has made a proper report on it

By the order, it was referred to the Master to tax the bills of costs, and it was ordered that the parties should produce all books, &c., and that they should be examined on interrogatories, and that upon Harries paying to Thomas what should appear to be due to him on such taxation or in case the said bills should appear to be already paid, then Thomas was to deliver to Harries all deeds ; and if he, Thomas, was overpaid, that he should refund and repay to Harries what the said Master should certify to be over-
[*313] paid ; and that all proceedings at law, on account of the said bills, should be stayed until the Master made his report.

Upon this order, it is clear, that the Master had something to do beyond taxing the bills of costs : he had to tax the several items of the bills of costs : and if he found that they had been paid, certain things were to be done ; and if he found that Thomas had been overpaid, then something else was to be done ; for Thomas was in such case to refund what had been overpaid. It was, therefore, necessary for the Master to do something in addition to the taxation of the costs. I quite agree, that upon such an order, the Master has no authority to take an account of pecuniary matters between the parties which are quite foreign to the bills of costs ; but the question here is, whether the transaction amounted to payment or appropriation.

Thomas was employed as the solicitor of Harries, and in the course of that employment he had in his hands moneys belonging to Harries, which he was instructed to lay out on security. It appears that the greater portion of these bills of costs arose in respect of these very transactions ; and it also appears, that there was a considerable sum of money due, on a balance of account, to Harries from Thomas ; and the question really is, whether these transactions were so connected, by the mode of dealing between the parties as to make the moneys which were in the hands of Thomas on account of Harries, applicable to the payment of the bills of costs incurred in the transactions on

1839.—Vivian v. Mills.

account of which the balance arose. It is sworn by Harries in his examination, that it was his understanding, and that he is confident it was the understanding of Thomas, that what was due from Thomas to Harries should be applied, in the first instance, in payment of his bills of costs. I cannot find anything in *the affidavit of Thomas, or any other [*314] evidence, which contradicts this statement. He does not deny that this was the understanding,—that he was not to pay over the balance to Harries, until Harries had satisfied his bills of costs; so far is this from being denied, that in one case, in February, 1832, when he made out an account of what was the state of the balance between him and Harries, he brought into his account the amount of his bills of costs, so that the conduct of Thomas is in conformity with what is stated by Harries to have been the understanding between them.

In the Master's office the bills of costs were taxed, and the Master found that 242*l.* was due; and the next question was, whether there had been any payment. It was proper for the Master to inquire whether Thomas had in his hands money applicable to the payment of the bills of costs and which he had a right to retain for that purpose. When the Master did inquire he found the sums of 250*l.* and 50*l.*, admitted to be in the hands of Thomas, which it is not denied, Thomas considered subject to the payment of his bills of costs. It appears to me to be established, that Thomas had in his hands money, which, according to the understanding of both parties, was applicable to the payment of the bills of costs; and is he to be allowed to say, that he will not so apply it, in order that he may defeat the demands which Harries has on those sums? I think that the Master was right on this point; but, on the other hand, it does not appear to me that he was right in computing interest on the balance in Thomas' hands. I must declare that this interest is not to be allowed; and if the parties disagree, I must refer it back to the Master to review his report on this point. I give no costs on either side.[1]

VIVIAN v. MILLS.

[*315]

1839: March 26.

Bequest of testator's estate, to be equally divided between his children on attaining twenty-one, with a power of advancement "from their respective portions" of the testator's estate. A child survived, but died under twenty-one: Held, that he took a vested interest

THE testator, James Hare, by his will, dated in 1819, after providing certain annuities for his wife, his mother and also for his illegitimate son, expressed his will and mind regarding the maintenance of his children, and also as to the disposal of the residue of his personal estate, in manner follow-

[1] Vide, *In the matter of Rice*, 2 Keene, 181, 183, n. 2. *Id.* 187, n. 1.

1838.—Pemberton v. Topham.

ing: "I wish a proper allowance, at the discretion of my executors, may be made to Mrs. Hare, for the care of my son, James Hare, or any other children I may have by her, after they are five years old; and that an education at one of the public schools may be given to the boys. My estate, subject to the above annuities, *to be equally divided* amongst my legitimate children *on their attaining the age of twenty-one years* respectively: my executors will use their discretion, in causing any moderate advances to be made for the purpose of placing my children in a profession, *from their respective portions* of my estate."

The testator died in 1820, leaving two legitimate children, namely, James Hare, then of the age of four years, and Maria Henrietta Hare.

James Hare, the son, died in 1834, in the eighteenth year of his age, and the question was, whether he took a vested interest in the personal estate.

Mr. *Pemberton* and Mr. *Blenman*, for the plaintiff, who was a son [316] of Mrs. Hare, by a second marriage, *cited *Hanson v. Graham*, (a) *Branstrom v. Wilkinson*, (b) *Murray v. Addenbrook*, (c) *Mills v. Roberts*. (d)

Mr. *Burge* and Mr. *Glasse*, for the administratrix of James Hare, the younger, deceased.

Mr. *Kindersley* and Mr. *Wray*, for Maria Henrietta Hare, the surviving child of the testator.

Mr. *Piggott*, for Sir Hussey Vivian.

Mr. *Girdlestone*, for the second husband of Mrs. Hare.

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS held that James Hare, the younger, took a vested interest in the personal estate, which therefore belonged to his next of kin. [1]

PEMBERTON v. TOPHAM.

1838: November 15.

In a creditor's suit instituted by the plaintiff on behalf of himself and all other creditors, the defendant is entitled on motion, at any time before decree, to have the bill dismissed, on payment of the demand of the plaintiff and his costs as between party and party; but if there be other defendants, their costs must also be paid.

THIS was a creditor's suit, instituted by Thomas Pemberton, "on behalf

(a) 6 Ves. 238.

(b) 7 Ves. 420.

(c) 4 Russ 407.

(d) 1 R. & Myl. 555

[1] In order to carry the intention of the testator into effect, the amount of the advancement must be separated from the bulk of the estate; and it is upon this principle that a legacy may become vested by the gift of interest, previous to the time of payment, although that time may be contingent, provided there be no ulterior limitation in case of the contingency not happening. *Vandry v. Geddes*, 1 Russ. & M. 208, and n. 3, *ibid.* *Saunders v. Vautier*, Cr. & Pl. 248. 4 Russ. 419, n. 1.

 1838.—*Pemberton v. Topham*.

of himself and all the other creditors of Jonathan Stanway, who should come in and contribute towards the expenses of this suit," *against [*317] the trustees and executors under his will and the parties beneficially interested in the real estate of the testator. The object of the suit was to obtain payment of the testator's debts out of his personal and real estate.

The testator was indebted to the plaintiff in 30*l.* on a promissory note. The defendants had appeared, but had not put in their answer.

Mr. *H. W. Cole*, on behalf of the executors, now moved, that on payment to the plaintiff of the amount due on the promissory note for principal and interest, together with costs of suit to be ascertained by the Master, this bill might stand dismissed, or that all future proceedings might be stayed.

Mr. *Pemberton*, contra, contended, that the plaintiff was not entitled to dismiss a bill, filed not only for his own benefit, but for the benefit of all the other creditors of the testator; and secondly, that if this suit were stayed, the plaintiff ought to be allowed his costs as between solicitor and client, which he might probably obtain if this suit proceeded.

He contended also, that the executors ought also to pay the costs of the other defendants to this suit and of this motion.

THE MASTER OF THE ROLLS said that the plaintiff could only be entitled to costs between solicitor and client where there was a deficiency of assets, or, in other words, out of the creditor's own fund: and his Lordship held, that on the defendant's discharging the demands of the plaintiff in this suit, and on payment of the *costs, taxed as between party and [*318] party, of the plaintiff and the other defendants, the executors were entitled, at any time before decree, to have this suit dismissed; and that until decree the other creditors had no interest in the suit.[1]

It was therefore ordered, that the defendants the executors, should pay to the plaintiff 30*l.*, with interest to be ascertained by the Master; and it was referred to the Master to tax the costs of the plaintiff and of the defendants, other than the executors, including the plaintiff's costs of this application; and it was ordered, that the same should be paid by the defendants the executors, and thereupon, and on payment of the 30*l.* and interest, it was ordered that the bill stand dismissed out of court.

[1] In a suit by a creditor on behalf of himself and all other creditors, if the debt of the plaintiff be admitted or proved, and the executor or administrator admits assets, the plaintiff is entitled at the hearing to an immediate decree for payment, and not to a mere decree for an account. *Woodgate v. Field*, 2 Hare., 211. And see *Holden v. Kynaston*, 2 Beav. 204.

 1839.—Bunbury v. Bunbury.

BUNBURY v. BUNBURY.

1839 : April 25, 26 ; May 24, 29.

An injunction granted, on terms, to restrain proceedings instituted in Demerara to recover real estate there, and an order made for a consignee and manager of the estate and produce ; it appearing to the court that there were many other questions between the parties connected with the estate, which could be more conveniently determined together in this country.

THIS was a motion for an injunction to restrain the defendants, Hugh Mills Bunbury, and Alfred Victor Count de Vigny and Lydia Jane his wife, from prosecuting legal proceedings in the colony of Demerara, to recover possession of certain estates or plantations there, and for a reference to the Master to appoint a manager to the estate, and a consignee of the produce.

The case was, that Hugh Mills Bunbury, the testator in the cause, [*319] being an English subject, about the year *1788, went to the island of St. Vincent, an English colony subject to the laws of England ; and that, on the 6th of August, 1791, he there married Lydia Prisca Cox, also an English subject, and who became the mother of the defendants Hugh Mills Bunbury and Lydia Jane Countess de Vigny. At the time of this marriage Demerara was a Dutch colony subject to the laws of Holland ; in the year 1796, it was captured from the Dutch, and soon afterwards Mr. Bunbury, who obtained the office of ordnance storekeeper, went hither with his wife and family, and he resided there under circumstances, which, as it was alleged, did not vary his domicile, but left his character of a domiciled English subject unaltered. Under these circumstances, and before the year 1799, he purchased a quantity of bush land, which he brought into cultivation, and which now constituted the estates or plantations in question in this cause, and were called the Devonshire and the Devonshire Castle plantations. It was admitted, that in the absence of special contract or special circumstances, the law of Holland conferred upon the wife a community in the property of her husband ; and that upon the death of the wife, her share devolved upon her children. -

Mrs. Bunbury died in Demerara in the year 1800, and the defendants, Mr. Bunbury and the Countess de Vigny as her children, now claimed to be entitled, to that which they alleged to have been her share of this Demerara property, acquired by Mr. Bunbury during his marriage with her.

At the time of her death the children were infants, and notwithstanding their alleged rights, Mr. Bunbury the father, as well whilst they were infants as after they attained their respective majorities, managed and he continued to manage and deal with the property as his own, till the time of [*320] his own death, which took place on *the second November, 1838.

He resided in Demerara till the year 1812, when he returned to England ; but he went to the colony on subsequent occasions, and resided

1839.—Bunbury v. Bunbury.

there for different periods of time. He died in England, and his domicile appeared to have been always in England.

On the occasion of his marriage with Lydia Prisca Cox, a settlement was made whereby certain slaves were conveyed to trustees on trust for himself for life, with remainder to his wife for life; with remainder to the children of the marriage, to be equally divided between them at twenty-one or marriage. At the date of this settlement, he held no land which was subject to the law of Holland, and no provision was made for the event of his acquiring any.

In the month of March, 1812, Mr. Bunbury married Alicia Lillie, now his widow, the defendant Alicia Bunbury, and pursuant to articles made before the marriage, he executed a settlement, dated the 29th day of March, 1822, whereby he covenanted to vest the two Demerara plantations in trustees, subject to certain mortgages, on trust, to pay his wife 500*l.* for pin-money, and subject thereto, on trust for himself for life; and then to raise the sum of 30,000*l.*, and secure a jointure of 2000*l.* a year for his widow, and subject thereto, to the issue of the marriage as therein mentioned. The 30,000*l.* was made subject to the appointment of Mr. Bunbury, and in default of appointment, was limited to the children of the first and second marriage equally; but Mr. Bunbury had a power to release or extinguish the charge as he thought fit, and some time afterwards he exercised that power. This instrument purported to deal with the property, as if Mr. Bunbury had the entire dominion over it; and no notice whatever was taken of any claims which might be made by the children of the first marriage under the law of Holland.

*In January, 1832, he had five children of the second marriage, [*321] and appeared to have been then advised or to have considered, that the Dutch law might interfere with his power of disposing of his property in Demerara,—that he might have a power of disposing of a moiety only, and that the other moiety might belong in equal shares to his children of both marriages; and under these circumstances he made a will dated the 23d day of January, 1832, and thereby devised to his children of the second marriage, one moiety of his Demerara estates, in augmentation or addition to the shares of the other moiety, to which they might be entitled by the Dutch law, and subject to the jointure provided for his wife by the settlement of March, 1822, which he confirmed as far as he could; but supposing that each of his two children by the first marriage might become entitled to a seventh part of a moiety of the plantations, being a fourteenth part of the whole, he did, as far as in him was, confirm such fourteenth part to each of such two children, in case they were entitled thereto, and directed that the negroes comprised in the settlement of August, 1791, should be equally divided between them.

He made a first codicil, dated the 27th of January, 1832, and a second dated the 10th of October, 1833, and by the latter, after providing for another child born since the date of his will, he recited, that as owner of the Demerara

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estates, he had become entitled to a very considerable sum of money as a compensation for emancipated slaves thereon, and thereupon he gave all such compensation money to his wife, on trust, as to two sums of 1000*l.*, for the benefit of his two children of the first marriage, with remainder to their children, respectively, with remainder to the children of the second marriage; and he directed, if the children of the first marriage or either of them [*322] should give any trouble or annoyance, or *interfere with the direction or control of his estates, by litigation or any affected claim, the bequests made to them to be void; and he directed his executrix to deduct all sums of money and advancements which he had made, paid or advanced or might be chargeable with on his or her account, from and against any claims they might set up, by virtue of the Dutch law or otherwise.

The testator made two other codicils to his will, and died, leaving the two children of the first marriage, and eight children (one of them posthumous) of the second marriage surviving him.

Since his death the children of the first marriage had claimed and they now claimed, to be entitled to, *first*, a moiety of the whole of the Demerara plantations; *secondly*, a moiety of all the profits which had been made by the cultivation of the plantations since the death of their mother in 1800; *thirdly*, a moiety of the slave compensation money; *fourthly*, children's parts of the other moieties of the estates in participation with the children of the second marriage; and *fifthly*, such shares of the testator's personal estate as the laws and usages of Demerara might entitle them to: and they had commenced legal proceedings in Demerara for the recovery of a moiety of the plantations.

The plaintiffs in this cause, were the seven children of the second marriage who were born in the testator's lifetime, and they filed their bill, for the purpose of having their rights and interests under the settlement of March, 1822, and under the will and codicils declared and secured, and the trusts of the settlement carried into execution; and they prayed, that the will and [*323] codicils might be established, and the trusts thereof *carried into execution, so far as they confirmed the settlement or were consistent therewith; or that the trusts of the will and codicils might be carried into execution without reference to the settlement: and the bill further prayed for the usual and necessary accounts in the administration of the estate: for an injunction to restrain the defendants from prosecuting their claims in Demerara: and for a manager and consignee.

The plaintiffs, the defendant Alicia Bunbury, who was the testator's widow and legal personal representative, John Pirie, a trustee of the settlement of March, 1822, and the defendant Hugh Mills Bunbury were all of them resident in this country; the Countess De Vigny was domiciled with her husband in France, but they had appeared in this cause and answered the bill: no party having any right to or interest in the property, was resident in Demerara.

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A motion was now made, on the part of the plaintiffs, for an injunction to restrain Hugh Mills Bunbury, Alfred Victor, Count de Vigny and Lydia Jane his wife from prosecuting the said proceeding or any proceedings in any court of the colony of Demerara, to recover possession of the plantations, estates, stock or effects of the testator in Demerara, and for a manager of the estates, and a consignee of the produce.

Mr. *Pemberton*, Mr. *G. Richards* and Mr. *L. Wigram*, in support of the motion, contended, that there could be no question as to the jurisdiction of this court to interfere and prevent a party from prosecuting legal proceedings in another country, where equity required such an interference:

Beckford v. Kemble,^(a) *Kennedy v. *The Earl of Cassillis*,^(b) [*324] *Bushby v. Munday*,^(c) *Harrison v. Gurney*,^(d) *Lord Portarlington v. Soulby*,^(e) *The Marquis of Breadalbane v. The Marquis of Chandos*.^(g)

That the numerous questions arising between the parties in this cause would be much more conveniently determined in this court alone. That the principal point, was not as to what was the Dutch law, but was a question of international law, on which there existed the greatest doubt,^(h) and might be equally well decided in this country as in Demerara; besides this, there were many other questions arising out of these matters which could only be determined in this country. First, there was a question as to the effect of the ante-nuptial contract previous to the first marriage; next, there was a question of election; thirdly, the effect of the laches of the parties for thirty-nine years, during which other persons had acquired rights in the property for valuable consideration, was also to be determined; fourthly, there were questions on the slave compensation money; as to the personal estate of the testator; and as to the effect of the settlement on the second marriage: in addition to all these questions, accounts, similar to partnership accounts, of the moneys expended on the estate by the testator, and accounts of moneys paid by the testator for the maintenance and advancement of the children of the first marriage must be taken; that all these points could be settled in England alone, where all the necessary parties had appeared, whereas the proceedings in Demerara, where none of the parties resided, could determine the bare right to the land alone, which was of little value without the personalty attached to it.

*That the conflict of decision which might take place between [*325] the Privy Council on appeal from the colony, and the House of Lords on appeal from this court, would be avoided, by this court determining the various questions between the parties.

Mr. *Burge*, for the widow, supported the application:

Mr. *Spence* and Mr. *Wood*, for Mr. *Pirie*, the trustee.

(a) 1 Sim. & Stu. 7.

(b) 2 Swan. 313.

(c) 5 Mad. 297.

(d) 2 Jac. & W. 563.

(e) Mylne & K. 104.

(g) 2 Myl. & Cr. 711.

(h) 1 Burge's Colonial and Foreign Law, 599. Story, [Conflict of Laws,] 132. [§ 142 et seq.]

 1839.—*Bunbury v. Bunbury.*

Mr. *Kindersley* and Mr. *G. Turner*, contra, contended that the right to land was to be determined by the law of the country where the land was situate, *The Attorney General v. Stewart*,^(a) *Elliott v. Lord Minto*,^(b) *Martin v. Martin*;^(c) and that real actions ought to be left to the determination of the courts of the country in which the land was; that this court never interfered with the jurisdiction of foreign or colonial courts, except in those cases where some personal equity was made out against the party proceeding there; even an action of ejectment in this country would not be stopped by this court, unless a personal equity were made out against the plaintiff at law; here, although such personal equity had been charged by the bill, it had been denied by the answer.

That a question of Dutch law must be determined in this case; and it would be a much more satisfactory mode of proceeding to obtain the solemn decision of a court of competent jurisdiction in Demerara on the point, than to have it decided upon an inquiry before the Master upon the opinions of Dutch advocates.

That the possibility of a conflict of decision between the House of [*326] Lords and the Privy Council, was not, *of itself, a sufficient reason for the court taking to itself jurisdiction over matters, which ought properly to be determined by another court; for if such were the case, this court would take an exclusive jurisdiction in every case of a disputed will which related to realty and personalty, in which the courts of common law and the House of Lords might decide in one way as to the validity of the will as regarded the real estate, and the Ecclesiastical Courts and the Privy Council another way as regarded the personalty. They cited *Farquharson v. Seton*.^(d)

Mr. *Pemberton*, in reply.

May 24.—THE MASTER OF THE ROLLS:—The defendants insist, that the right to the land depends on the law of Holland, and ought to be determined by the courts of Demerara, which are competent to decide upon the title, and give possession accordingly; and I should concur with the argument against this motion, which has been addressed to me on their behalf, if nothing more than an insulated question of title to land in Demerara were in litigation between these parties, or if that question were only affected by a case of election arising on the will and codicils of the testator, or by the alleged acquiescence in the testator's title, which is denied by the answer.

But it does not appear to me, that the matter in controversy between the parties, can be decided by the determination of an insulated question of title to land in Demerara.

The testator's property in Demerara consisted partly of land or im- [*327] movable property, and partly of cattle, *implements, and other movable property or personal estate. With respect to the Dutch law, as

(a) 2 Mer. 156.

(b) 6 Mad. 16.

(c) 2 Russ. & M. 507.

(d) 5 Russ. 45.

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applicable to the property of persons married in Holland and domiciled there, no question has been raised in argument. The law of community prevails, if not excluded by ante-nuptial contract; and the *communio bonorum omnium* and the *communio questuum* extend to both real and personal estate—to movable as well as to immovable property. The law is so stated in the answers of the defendants, and they claim distinctly, a moiety of the lands, and of all the rents and profits thereof, which were received by the testator subsequently to the death of his first wife; and they further insist upon their right to all such share of the testator's personal estate, as they may be entitled to, according to the laws and usages of Demerara. The claim to a share of the personal estate is advanced somewhat obscurely and cautiously, but in such a manner as to save any right which the defendants may, on any occasion, be enabled to substantiate, and I must understand the defendants to claim such right, as the law of community would give them.

With respect both to the land and the personalty, the question will be, how far the law of community is affected by the circumstances that the husband and wife were, at the time of their marriage, English subjects domiciled or deemed to be domiciled in England; that an ante-nuptial settlement, making provision for the wife, was made; that the marriage was, or must be deemed to have been, solemnized in England; and that the parties continued to be domiciled, or must be deemed to have been domiciled in England, up to the time of their respective deaths. From the authorities which were cited at the bar, and from others to which I have been guided by the very valuable work of Mr. Burge—a work containing extensive and accurate information *which greatly facilitates the investigation of [*328] questions of this nature, and tends to the correct decision of the causes in which they arise, it appears, that the most eminent jurists have differed greatly in opinion upon the effect of such circumstances; and as to the extent to which the *lex loci contractus* and the law of the domicile of the parties ought to prevail.

I do not think it necessary or proper, to intimate any opinion upon the effect which these circumstances may have upon the title to the land: but whatever it may be, it cannot be precisely the same, as that which the same circumstances may have, upon the right to the personalty.

The claim of the defendants, as regards the land, rests upon this: that according to the general law of all countries, the title to land depends upon the law of the country in which the land is situate. But according to the same general law, the title to personal estate depends upon the law of the country in which the owner is domiciled: and if according to the argument of the defendants, a domiciled Englishman, who is a married man, cannot purchase a plantation in Demerara without making his wife partner or tenant in common with him in the land, it would not follow, that she acquired any

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interest whatever in any personal estate, stock, implements or effects, which he might have purchased with the land or afterwards placed upon it.[1]

By the law of England, all the personal estate which Mr. Bunbury possessed or acquired during the life of his first wife was his own, and was not subject to any claim which she could have made to be partner or to hold in community with him; and if the general law is to govern this [*329] question, she had no claim to, or interest *in the money, with which he bought the estate, or the money by means of which he stocked and cultivated the plantations, or the cattle, implements and effects, which were upon the estate at the time of her death. The defendants, however, claim a share of the testator's personal estate (not indeed confining their claim to personal estate in Demerara,) but they claim a share of the testator's personal estate by the law and usages of Holland; and I conceive that they must intend to raise the question, whether the law of Holland is or is not to prevail in this respect, and to contend for the affirmative.

The defendants therefore, claim the benefit of a species of partnership, and to be entitled to a share of the partnership property, consisting partly of real and partly of personal estate. By the general law, the real estate situate in Demerara, is subject to the law of Holland, and the personal estate anywhere situate, is subject to the law of England.[2] But the defendants insist, that in this case, both the real and personal estates are subject to the laws of Holland, and claim to be entitled to accounts of what is due to them accordingly.

Out of this claim many considerations arise. Is the claim of the defendants to have any part of the testator's personal estate subjected to the law of community, a claim which is to be determined by the law of Holland, or would this court be under any obligation to submit to the decision of any Dutch court upon the subject? If no part of the personal estate be or ever was subject to the law of community, what effect would that circumstance have upon the question, whether the land was subject to the law of community? Is it consistent with the law of community, independently of [*330] *special contract, that only part of the property of the conjoints should be subject to it? And supposing it to be determined by the law of Holland, that the land was subject to the law of community, though, under the circumstances of the marriage and domicil, the personal estate was not, and consequently, that (considering the case as a partnership in the land) the whole purchase money was paid by one partner, and the whole expense of cultivation defrayed by him, would he or not, have any just or equitable claim to be reimbursed his advances, by the partners so unexpectedly forced upon

[1] Rights dependent on the nuptial contract are, as far as regards personal property, governed by the *lex loci contractus*. *Decouche v. Savetier*, 3 Johns. Ch. Rep. 190. But whether, as regards real property, such rights are to be governed by the *lex loci contractus*, or the *lex loci rei sitæ*, is a more embarrassed question. *Story's Conf. of Laws*, § 146, *et seq.* § 158, 159.

[2] Vide *M'Cormick v. Sullivan*, 10 Wheat. 202. *Johnson v. Rushford*, 1 Rus. & M. 249. *Chapman v. Robertson*, 6 Paige, 630. *Hawley v. James*, 7 Paige, 213. *Burt v. Young*, 9 Sim. 190. *Bentinck v. Willink*, 2 Hare, 1.

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him by the laws of Holland, and who are now demanding their share of the land? And if there be any such equitable claim, would effect be given to it as a lien on the land under the Dutch law, or would it be an equity only to be made available by the English law, and enforced not *in rem* by the law of Holland, but *in personam* by the jurisdiction which this court has over the parties? These are, I am sorry to say, by no means all the questions which may have to be discussed; and it appears to me, that the question as to the personal estate cannot be decided by the law of Holland alone; and that if a moiety of the land should, according to the law of Holland, be decided to belong to the defendants, there may still be questions, to be decided according to the principles of equity acted upon in this court, before it can be determined that the defendants ought, in equity, to take for themselves the moiety of the land which may be adjudicated to them.

If the real estate in Demerara is to be considered by the law of the colony, as a partnership property, it is nevertheless partnership property belonging to English subjects. It must be dealt with in connection with the other, if there be other, partnership effects, and must be held subject to all the just claims which may be made upon it; and then comes the question, [*331] whether it would be just to permit the defendants to withdraw their alleged share of the land from the mass of the partnership property or from the estate of the testator, by a separate proceeding, which does not and cannot take into consideration all the questions which must be determined here, before it can appear whether they have a clear equitable as well as legal title to the land which they claim.

Under all these circumstances, having regard to the questions between the parties, to the accounts which must be taken for the purpose of giving effect to the claim of the defendants, if substantiated to any extent, and seeing that such accounts can only be taken here where the parties are, the ends of justice do appear to me to require, that the defendants should not be permitted to proceed in Demerara to take possession of their alleged share of the land, and that the estate should, for the benefit of all parties, be protected by a manager and consignee till their rights are determined.

But if possession be not taken and no execution be sued out, there may be a convenience in permitting the defendants to proceed to make out their right to a share of the land, so far as to obtain judgment or sentence in their favor, if the law of the colony should entitle them to it. And the plaintiffs ought, I think, to consent (as was done in *Beckford v. Kemble*) to any order to be made in the suit in Demerara, which this court shall at any time think reasonable.

May 29.—The case was again argued on the form of the order to be made.

THE MASTER OF THE ROLLS :—The question on the present occasion is, whether the court ought to assume jurisdiction of the mat- [*332]

 1839.—*Banbury v. Banbury.*

ters which are in controversy between these parties and to determine the questions between them, or whether they ought to be determined in the court of Demerara.

On that question I have already expressed my opinion, for the purpose of this motion, and subsequent reflection has not given me any reason to alter it; at the same time, it is right I should say that I am fully sensible of the many difficulties which attend cases of this kind. There are questions of the greatest nicety and complexity arising between these parties, and I am perfectly aware how easy it may be to make a slip in endeavoring to come to a right conclusion on the subject.

Having formed my opinion that this court ought to have jurisdiction of the case, it is my duty towards those who will be affected by the order I make, not to place them in a worse situation than is absolutely necessary for the purpose of the proceedings in this cause; and therefore, I feel myself bound to place the defendants in the best situation in which I can, having regard to the circumstance, that it may ultimately appear that they are entitled to the share of the property which they now demand; and as far as I can, under present circumstances, I must enable them to get possession of that which may be their right, as soon as it shall be determined to be theirs, if that event shall happen.

A collateral question has given rise to the long discussion of this morning,—a discussion which I do not in any degree regret; on the contrary, I should say that I [*333] have derived considerable assistance from looking at this question in different points of view. The question is, whether I can, on the present occasion, avail myself of any proceedings which may be carried on in Demerara, for the purpose of assisting the court in determining the real questions between the parties in the cause, when they come on for a final adjudication. There are various very complicated questions in controversy; some of those questions may depend upon or be most materially influenced by the law of Holland, and there is a proceeding now pending before a competent court, which adjudicates according to the law of Holland, which has been adopted by the parties who are to be restrained by the order which I am now to make.

The law of Holland will come into question and have to be ascertained in the proceedings here. The question now raised is, whether those proceedings which have been commenced in Demerara can be so conducted, as to arrive at a conclusion which will assist in the determination of what is the law of Holland in regard to the circumstances of this case. Now it is to be observed, that I have scarcely the means, and if I have the means, they have not been pointed out to me at the bar, by which I can compel the parties so to conduct themselves in the proceedings in Demerara, as to raise all the questions, and to lead to such a conclusion as will really afford this court the means of adjudicating with greater satisfaction than it could otherwise do; for I know of nothing which is to prevent the defendants in those proceed-

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ings in Demerara, from confessing judgment, and thereby precluding all decision of, and withdrawing all attention of the court from the points, which for the purpose of this suit, it would be convenient to determine, and thus leave the plaintiffs nothing but that which is the bare right on the judgment so obtained.

*The plaintiffs in this cause, have more than once, on the present. [*334 occasion, offered to give judgment or sentence; they have said, let further expense be spared, and we are willing to confess judgment or sentence in that court, and which of course will have to be dealt with, according to the rights of the parties, as they may be determined in this court. The defendants here, insist on going on and having a controversy in Demerara, but they have not pointed out to me, the means by which I am to compel it to take place; and for anything I know to the contrary, if I were to say that the defendants here should be at liberty to proceed in the colonial court, the very next proceeding in that court would be an admission by the plaintiffs that the defendants are entitled to sentence in that court, and then nothing whatever would be obtained. It is undoubtedly competent for this court to direct the parties so to conduct themselves in any proceedings here or elsewhere, as to raise the necessary questions which it is important to have decided between them; but it has not been suggested to me that I ought not to give any directions in that respect; and I think that it is not a convenient occasion, on a motion of this kind, for the court to determine the sort of direction which ought to be given, even it could be satisfactorily given; it would be a more fit opportunity to give such directions when the cause came on for hearing, when every thing that was in controversy between the parties was completely brought forward, and the court was in possession of all the evidence which they thought fit to produce.

With regard to the first object which I think it is my duty to attend to, namely, to place the defendants in as good a situation as I can, that might be accomplished by ordering the defendants in the proceedings *in Demerara to give judgment or sentence at once. It has occurred [*335] to me, however, in the course of the present discussion, that although in one sense this might be a perfectly right and proper course of proceeding, yet I might, nevertheless be doing something which might be prejudicial to the parties and to the court, if, by concluding these proceedings by sentence or judgment, I deprived the court of the means of availing itself of those proceedings with the directions that may be found proper to be given, on the hearing of the cause; and though I confess, that when this matter was under my consideration before, I was exceedingly desirous to avail myself of those proceedings, and am now desirous of availing myself of those proceedings hereafter, if I can do so, yet, under the circumstances to which I am now brought, I do not think that I have the means of giving those directions, which are necessary for the purpose of enabling me to have all the benefit, which I may possibly derive hereafter, from some of the proceedings in that court.

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What I think is proper to be done at present, is this, not to stay these proceedings unless the plaintiffs in this cause, who are the defendants there, will consent to confess judgment or to submit to any order whatever that this court may at any time think reasonable, with respect to the proceedings at Demerara. If they think fit to consent and bind themselves to do that, then, I think, I do all I ought to do or can do, without actually depriving myself of the means of availing myself hereafter of those proceedings in Demerara. This I am as anxious to do as the parties can possibly be, when the time comes that I can do it effectually and properly; but it may turn out to be wholly unnecessary to do so—it may turn out that by the proceedings [•336] *between these parties, it cannot be effectually done; but I do not wish to deprive myself of the means, if I should be able to avail myself of them, of doing so, on any future occasion. If therefore, the plaintiffs here will consent, I will make that order.

It was ordered that the plaintiffs and the widow “undertaking to submit to and carry into effect any order which the court might hereafter think fit to make, with respect to the proceedings instituted in the colony of Demerara, by the defendants, H. M. Bunbury and A. V. Count de Vigny and wife, as in the pleadings mentioned,” that the defendants be restrained from prosecuting any proceedings in Demerara, to recover possession of the plantations, or any stock or effects upon or belonging to the same. And the court referred it to the Master to appoint a consignee and manager of the estates.(a)

[•337]

*HAYDON v. BELL.

1838: November 14.

A party contracted for the purchase of the benefit of an agreement for the lease of a public house, and also of the stock and good will; he entered into possession before the lease had been granted, paid part of the purchase money and mortgaged his interest: Held, that after this mode of dealing he was not entitled to call for the production of the lessor's title, or for evidence that the lease was made in conformity with the power under which it was granted.

IN December, 1833, a Mr. Hynde had agreed to grant to the plaintiff, Mrs. Haydon, a lease of a public house, upon her completing certain repairs thereof to the satisfaction of his surveyor. Mrs. Haydon, who was in possession, completed the repairs, and in August, 1834, before any lease had been granted to her, she entered into an agreement with the defendant Henry Bell, who acted on behalf of the defendant Ann Bell, to sell all her interest in the

(a) Affirmed by the Lord Chancellor, 19th June, 1839. [That this court has authority to restrain proceedings in a foreign, as well as a domestic court, when the parties to be affected are within its jurisdiction, see 2 Myl. & Cr. 728, n. 1. *Beckford v. Kemble*, 1 Sim & Stu. 7, 16, n. g. *Glascott v. Lang*, 3 Myl. & Cr. 451, 459, n. 1. *Booth v. Leicester*, id. 459. S. C. 1 Keen, 580. *Wedderburn v. Wedderburn*, 4 Myl. & Cr. 585. S. C. 2 Beav. 208.]

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property and good will of the business ; the agreement being in the following terms :—

"*Flying Horse, Oxford Street.*—Mrs. Elizabeth Haydon agrees to sell the lease of above house, having twenty years and upwards, at a rental of 110*l.* per annum, to Ann Bell at the sum of 2050*l.* ; the goods, fixtures and stock now on the premises to be paid for in the usual way of valuation ; possession and completion to be on or before the 28th August, instant ; all rent, taxes and gas to be cleared, up to the time of possession, and broken windows allowed for ; Mrs. Haydon to do all the repairs, to obtain Mr. Hardwick's(a) certificate to enable the lease to be granted ; the expense of assignment, &c., to be paid jointly ; 1200*l.*, part of the purchase money, is to remain on security of the lease, with Henry Bell's notes for three years, at 5*l.* per cent., payable half yearly. The said Elizabeth Haydon not to carry on or be in any way interested in the business of a victualler or retailer of beer, at any house within half a mile of said Flying Horse, during the occupancy of the *said Ann Bell or Henry Bell or any other person on their account, [*339] under the forfeiture or agreed penalty of 500*l.*

"August 9th, 1834.

"*E. Haydon.*

For Ann Bell, *Henry Bell.*"

Possession of the property and of the stock in trade was delivered to A. Bell and H. Bell on the 2d of September, 1834, when the stock was paid for, and 850*l.* was paid by A. Bell on account of the purchase of the plaintiff's interest in the property. On the same day, Henry Bell gave to the plaintiff his promissory note in writing, bearing date the 2d September, 1834, as follows :—

"*London, 2d September, 1834.*

"£1200. Three years after date, I promise to pay Mrs. Elizabeth Haydon the sum of 1200*l.*, on the lease of the Flying Horse public house Oxford Street, (deposited as a security for said 1200*l.*,) being delivered up, with interest at 5*l.* per cent., payable half yearly.

"*Henry Bell.*"

"*Mr. Henry Bell, 10 Oxford Street.*"

Another memorandum of agreement, bearing date the 2d September, 1834, was signed by the plaintiff and Henry Bell, and was as follows :—

"Miss Ann Bell having agreed with me to purchase the lease of my house, the Flying Horse, No. 2 Oxford Street, for a term of twenty years and upwards at the rental of 110*l.*, for the sum of 2050*l.*, and I having agreed to let the sum of 1200*l.* on security of Mr. Henry Bell of No. 10 Oxford Street, by his giving a note of hand three years after date for the said sum of 1200*l.*, bearing interest at 5 per cent., the interest payable half yearly, and also a deposit by the said Ann Bell of an *agreement for the before [*339] mentioned lease, and also the lease, as soon as the same shall be as-

(a) The surveyor.

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signed by the said Elizabeth Haydon to Ann Bell, as a further security ; I hereby agree, at any time within the said three years, on payment of the said note of hand for the sum of 1200*l.* with the interest thereon, to deliver to Henry Bell on demand the lease of the said premises before described, with a proper assignment of the same, according to the terms and conditions of an agreement bearing date August 9th, 1834, and made between myself of the one part and Ann Bell of the other part : and I also further agree to allow Ann Bell to carry on the business of the said house in any name until the next transfer day of transferring licenses for the borough of Marylebone, and fully authorize her to act as my agent for that purpose during the period before stated."

On the same day Ann Bell assigned her interest in the contract to Henry Bell. The certificate of the lessor's surveyor having been obtained, the lessor, on the 27th of November, 1834, by virtue of a power reserved to him, granted a lease of the property to the plaintiff.

Henry Bell, in February, 1835, borrowed of Messrs. Young & Bainbridge a sum of 500*l.* on which occasion Ann Bell and Henry Bell entered into an agreement with Messrs. Young & Bainbridge, by which Henry Bell agreed to pay the 1200*l.* still due to the plaintiff, and that after payment of the 1200*l.* the lease should be assigned to Messrs. Young & Bainbridge for securing the 500*l.* ; and Ann Bell and Henry Bell agreed to do all necessary acts for procuring the assignment of the lease to Messrs. Young & Bainbridge.

The defendants having refused to complete their purchase, this [*340] bill was filed against Ann Bell, Henry *Bell and Messrs. Young & Bainbridge, praying a specific performance of the contract, "so far as the same remained unperformed, by payment of the 1200*l.* and interest," and in default, that the defendants might be foreclosed.

The defendants, by their answer, insisted that there had been misrepresentations on the part of the plaintiff; that the plaintiff was bound to show the lessor's title, or at least to show that the power under which the lease had been granted, had been duly executed.

Ann Bell also filed a cross bill, to set aside the contract on the ground of fraud ; which being unsupported by evidence, was dismissed with costs.

It was proved that the defendants had been informed that the new lease was, with one exception, to contain clauses and covenants similar to those in the old lease, and that Henry Bell was aware of the terms of the old lease having had it in his possession for some time previous to entering into the agreement.

Mr. *Pemberton* and Mr. *Bethell*, contended that the plaintiff was at once entitled to a decree for a specific performance of the contract, and for payment of the residue of the purchase money, with interest and the costs of suit, and that in default of payment the property should be ordered to be sold.

Mr. *Kindersley* and Mr. *Rogers*, for the defendant Ann Bell, insisted on the above points raised by her answer, and contended that the defendant, was, at

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least, entitled to the usual reference to the Master, to inquire if a good title could be shown.

*Mr. *Richards*, for Henry Bell, contended that he had improperly [*341] been made a party to the suit; he had signed the agreement, not on his own behalf, but as agent of Ann Bell: he had agreed, it was true, to give his promissory note, but that being done, there was no further claim or demand against him, except upon his legal liability under that note. That the bill had been filed before the note became due, and therefore the plaintiff was at that time entitled to no relief; that Henry Bell was answerable at law alone and not in equity, for the relief asked against him was in respect of a mere legal claim on the promissory note, and which, consequently, ought not to be the subject of a suit in equity.

Mr. *Chandless*, for Messrs. Young & Bainbridge.

Mr. *Pemberton* in reply. The defendants were perfectly aware of the nature of the plaintiff's interest and of the title; they have dealt with the property in such a manner as to preclude their calling for the production of the lessor's title; Henry Bell has obtained an assignment of the property, and has made default in payment of the interest on the promissory note: he was surety for the payment of the 1200*l.*, and was therefore a necessary party to the suit.

THE MASTER OF THE ROLLS:—This is a bill filed for the specific performance of an agreement; it is filed against Ann Bell, Henry Bell and Messrs. Young & Bainbridge, and it prays (his Lordship read the prayer of the bill.)

The contract was dated in August, 1834, and was for a lease which was to be granted, but which had not been granted at the time the contract was entered into; the price was to be 2050*l.*, of which 850*l.* was to be *paid down, and the remaining 1200*l.* was to be afterwards paid, and [*342] to be secured by the defendant Henry Bell. It does not appear that he executed the contract as a party, but as agent for Ann Bell, his sister; the 1200*l.* was to be paid in three years from the date, but before the contract was to be finally carried into execution, before the lease was to be granted, there were certain repairs to be done to the premises.

On the 2d of September, 1834, Henry Bell, in pursuance of the agreement, gave his promissory note for the sum of 1200*l.*; and on the same day the interest which had been obtained by Ann Bell was assigned to Henry Bell. It was part of the agreement, that after the lease was obtained, it was to be a security for 1200*l.* The lease was obtained on the 27th of November; and in February, 1835, Ann Bell and Henry Bell having occasion to borrow a sum of money, obtained it from Messrs. Young & Bainbridge, on an agreement, that subject to the rights of plaintiff, the lease should be assigned to them. We find that Ann Bell and Henry Bell were perfectly acquainted with the nature of the property, and the difference between the new lease and the old lease, and that they dealt with it for the purposes of assignment, and of

1838.—Haydon v. Bell.

making a security. This transaction took place between Ann Bell, Henry Bell and Messrs. Young & Bainbridge after the lease had been granted. Looking on these circumstances, and after such dealing with the property as appears in this case, it is clear that no objection can now be taken by them in point of title; there must therefore be a decree against Ann Bell, and her cross bill must be dismissed with costs.

As to Henry Bell, I am surprised at the way in which he has put [*343] his defence: he was a person answerable as the agent of Ann Bell, the party entitled under this contract. It was part of the terms of the agreement that the 1200*l.* should be secured by him for three years, with interest at 5 per cent.; afterwards, according to the agreement, he gave his note, and subsequently obtained an assignment of his sister's interest in the lease, and he dealt with it and borrowed money for himself. This did not make him a party to the original contract, but the rights of the plaintiff are to be worked out against the property, and are so intimately connected with the interest of Henry Bell, that the suit could not go on, unless he had been made a party, for he is both interested in the property and answerable for the unpaid purchase money.[1] That he must pay this, is quite clear, and his interest must be dealt with for the purpose of being sold; there must therefore be a decree for specific performance, by payment of the 1200*l.* and costs of suit by Ann Bell and Henry Bell; and in default, the lease must be sold, and the plaintiff's principal, interest, and costs paid out of the produce.

[1] As to the general rule that all persons interested in the subject must be made parties, see *Fawcett v. Whitehouse*, 1 Russ. & M. 132. *Bayley v. Best*, id. 659. *Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 349. *Hoxie v. Carr*, 1 Sumn. 173. *Wardell v. Claxton*, 1 Yo. & Coll. C. C. 265. *Hawley v. Cramer*, 4 Cow. 728. *Hawkins v. Hawkins*, 1 Hare, 546. *Mangles v. Grand Collier Dock Company*, 10 Sim. 541. A bill brought by a purchaser for the specific performance of an agreement to sell lot A. as described in the particulars of sale, was resisted by the vendors on the ground, (stated in their answer,) that by an arrangement to which the plaintiff was a party, part of lot A. as described, was deducted from that lot and added to lot B. It was held that the plaintiff on amending his bill, and putting in issue this averment, was bound to make the purchasers of lot B. defendants to the suit. *Mason v. Franklin*, 1 Yo. & Coll. C. C. 239. The heir at law of the vendor of real estate is a necessary party to a suit by the administrator of the vendor against the purchaser for specific performance of the contract. Wigram, V. C. says; "The purchaser, when he is sued for the specific performance of his contract, is entitled to have the question of the validity of that contract decided (if it is to be decided) in the presence of the vendor, or, if the vendor should be dead, in the presence of all the parties who represent him: he is entitled after the death of the vendor, to the same benefit from the suit, by obtaining a decree conclusive on the question, as he would have had if the vendor were living. If the vendor had devised the estate contracted to be sold, it is plain that the suit could not have been brought without making the devisee a party. If the estate, instead of being devised, has been allowed to descend, it is equally necessary that the heir should be a party." *Roberts v. Marchant*, 1 Hare, 547. In general, however, to a bill for the performance of a contract of sale, in the usual form, the parties to the contract are the only proper parties. *Robertson v. The Great Western Railway Co.* 10 Sim. 314. *Ibid.* 315, n. 1. And see *Glyn v. Soares*, 3 Myl. & K. 470. *Hoxie v. Carr*, 1 Sumn. 173.

1839.—*Livesey v. Harding.*

LIVESEY v. HARDING.

1839: January 16.

A mortgagee, who was a party to the suit, consented to a sale of the mortgaged property: Held that he must produce and leave in the Master's office the title deeds which were necessary in order to complete such sale.

THE original cause was instituted in 1823, for the purpose of administering the real and personal estate of the testator in the cause. At the death of the testator, his real estates were subject to several mortgages, and amongst them, to one vested in J. S. Beckett and R. P. Buddicom, who were afterwards made parties by supplemental bill.

By the decree, the real-estates were directed to be sold subject to the mortgages, unless the mortgagees *consented to the sale; and [*344] an account was directed to be taken of what was due to the mortgagees.

J. S. Beckett and R. P. Buddicom the mortgagees, (as was found by the Master's report in 1833,) consented to a sale of the estates free from their incumbrances; the estates were accordingly sold in lots, and produced considerably more than sufficient to pay all the incumbrances; the purchasers of the larger lots were to have the title deeds, and to covenant with the other purchasers for their production. The purchases were confirmed and the purchase money paid into court.

By a report dated in July, 1837, the Master certified, that it had been proposed, that the title deeds relating to the estates in question should be delivered to the respective purchasers thereof, on their executing certain deeds of covenant to the other purchasers of other parts of the premises; and he reported that such proposal ought to be carried into effect.

Accounts had been taken of what was due to the mortgagees, and the greater part of the amount due had been discharged by means of the funds in court.

A petition was now presented, praying that J. S. Beckett and R. P. Buddicom, the mortgagees, might leave in the Master's office all the title deeds relating to the real estate of the testator, and that they might be delivered out upon completion of the purchases.

Mr. *Kindersley* and Mr. *O. Anderdon*, in support of the petition, contended that a mortgagee who was a party to a suit, and consented to a sale, could not refuse to produce the title deeds which were necessary for the completion of the sales; for by consenting to a sale, he *undertook [*345] to do all that was requisite on his part for effecting it.

Mr. *Spence*, contra, for the mortgagees, contended that a mortgagee could not be compelled to part with his title deeds or any other security, until he was actually paid; and that the payment of the money and the delivery of the deeds ought to be contemporaneous. That a deposit of the money in court was not sufficient to entitle the other parties to take from a mortgagee

1839.—*Livesey v. Harding*.

his securities. The contrary was once held by Sir John Leach, but his decision was overruled by Lord Eldon.^(a) Lord Kenyon's advice was, that a mortgagee should put his deeds in a box, and sit on the box until the mortgage money was actually paid.^(b)

Mr. *Pemberton*, Mr. *Treslove*, Mr. *Koe*, and Mr. *Bethell*, for other parties.

THE MASTER OF THE ROLLS (without hearing a reply.) It seems that the mortgagees have done a great deal in facilitating the sale of the property. They made no objection to producing the deeds and allowed them to be compared with the abstract; they have done right, but no more than they were bound to do under the circumstances; they do not stand in the situation of the mortgagee whom Lord Kenyon advised to put his deeds in a box, and sit on the box until the mortgage money was actually put into his hands: for they are parties to the cause and parties to the decree; and having consented to have their mortgage paid off, by means of the purchase money to be produced by

the sale of the property, I think that they became bound to facilitate [*346] the *sale, and were not justified in creating an insuperable obstacle,

by insisting on the strict rights which they had in the first instance, and refusing to produce the deeds. The mortgagees, after having done every thing for the examination of the title and verifying the abstract, say, nearly at the conclusion of the affair, that they will not deposit their title deeds in the Master's office, until the time fixed for the payment of their mortgage money; but this is neither practicable nor reasonable, for the mortgagees must be paid out of the purchase money, which cannot be done until the purchasers are in a situation to release the fund, and that will not occur until they have had their conveyances; they cannot have their conveyances until covenants to produce the title deeds have been executed, and this cannot be done until the purchasers of the larger lots have possession of the deeds which they covenant to produce. It is said, fix a time for payment; but how is it possible to do it, and how can the mortgagees be in any way injured? the time cannot be fixed without the deeds being first brought into court.

I think it my duty to order the deeds into court: but I will make this addition to the order, that they are not to be delivered out without notice to the mortgagees.[1]

(a) See *Postlethwaite v. Blyth*, 3 Mad. 242; S. C. 2 Swans. 256.

(b) See *Sparke v. Montrieu*, 1 Y. & Coll. 107.

[1] A mortgagee is not bound to produce his mortgage deed to the devisee of the mortgaged estate, until payment of principal and interest, notwithstanding the devisee may be ignorant of the amount of the interest, the time of payment, and all the other particulars of the security. *Browne v. Lockhart*, 10 Sim. 421. In *Bentinck v. Willink*, 2 Hare, 8, Wigram, V. C., says: "I believe that no point is better settled than this—that where a mortgagor is proceeding against his mortgagee, a court of equity will not compel the mortgagee to produce his securities, except on payment of the mortgagee's claim; and the rule does not depend upon any peculiarities of system, but is founded on principles of abstract justice."

1839.—In re Gornall.

*IN RE GORNALL.

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1839: May 29.

Where a female appointed by the court to be guardian of an infant marries, it is of course to make a new reference to the Master to appoint a guardian.

By orders of the court, dated in 1830, Elizabeth Gornall, the mother of the infant petitioner, Robert Holt Gornall, was appointed his guardian during his minority, or until the further order of the court, and an allowance of 40*l.* a year was made for his maintenance.

In 1832, Elizabeth Gornall married John Heyes, and no new guardian having been appointed, a petition was presented on behalf of the infant, now of the age of twelve years, praying a reference to the Master to approve of a proper person to be his guardian, and to inquire and state what was proper to be allowed for his maintenance.

Mr. *Booth*, in support of the petition, relied on the case of *Wickey v. Whaley*, reported as an anonymous case,^(a) in which the Vice-Chancellor held, that it was quite of course, where a lady who had been appointed guardian married, to appoint a new guardian.

Mr. *Rogers*, for Mrs. Heyes the mother, contended that the reference now asked was unnecessary, the mother of the infant having been appointed guardian; that a mother had the right to the custody of the person of her children; *Villareal v. Mellish*;^(b) of which the court ought not, except in a case of misconduct, to deprive her; he argued, that the recognizances were *still subsisting, and that it would be a saving of expense not to disturb them. [*348]

THE MASTER OF ROLLS:—I conceive that it is the usual practice to make such a reference on the marriage of a female guardian; it is not, as it has been suggested in argument, that this lady, by reason of her marriage, is to be deprived of her child: if the order were to that effect, I should hesitate a long time before I should make it. Here is an unmarried lady appointed by the court to be the guardian of her child; she is made so under the circumstances in which she is then placed,—being a person *sui juris*, acting for herself in every way according to her own judgment and discretion. In that state of things she marries, and thereby loses that independent judgment and discretion, and becomes liable to be controlled by her husband.[1] Is it not fit that the matter should be investigated and inquired into? I think the usual form of doing it is by referring it to the Master to approve of a guardian;[2] under the order the mother will be at liberty to propose herself, and it is to be hoped

(a) 8 Simons, 346.

(b) 2 Swans. 536.

[1] Where husband and wife were appointed guardians by the proper legal authority, and the husband became addicted to fixed habits of intemperance, the court removed not only the husband but the wife, from the guardianship, she being subject to his control. *Kettletas v. Gardner*, 1 Paige, 488.

[2] Vide *In the matter of Mary England*, 1 Russ. & M. 499.

 1838.—Wigley v. Whitaker.

that her application will be successful; it may happen that she and her husband will be found to be the most proper persons to have the care and custody of the infant, and that she may be appointed guardian. I cannot, however, interfere in that, as it will be a matter for the consideration of the Master. I believe this to be the usual order; and I take it to be according to the ordinary rules of practice of this court, under the circumstances which have occurred here, to make such a reference. An inquiry is necessary, for the purpose of ascertaining whether, by the act of marriage, the guardian has not placed herself in circumstances which may not permit her to exercise that proper discretion which ought to be exercised for the benefit of this [*349] child. The next *friend of the infant has performed an act of duty to this court in informing it of the guardian's marriage.[1]

As to the recognizances, I can make no other order than that which I understand to be the ordinary and usual order to be made in such cases. It does not follow that the persons who have entered into the recognizances for the mother of the infant, would be willing to be sureties for her husband.

 WIGLEY v. WHITAKER.

1838: December 11, 12.

A. B., resident abroad, filed a bill against C. D., whereupon C. D. filed a cross bill; and C. D. before answering the original bill, moved to stay all proceedings in the original suit until A. B. had answered the cross bill: Held, notwithstanding what is said in *Ramkissenseat v. Barker*, 1 Atk. 20, that this was irregular.

IN this case the original bill was filed in 1837, to enforce a security executed by a married woman on her separate property, in favor of a creditor of her husband.

The plaintiff in the original suit was living abroad, and in June, 1838, was ordered to give security for costs. In December, 1838, the defendant, the married woman, filed her cross bill to set aside the security, on the ground of fraud and undue influence.

She had put in no answer to the original bill.

Mr. J. H. Palmer, on her behalf, now moved to stay all proceedings in the original suit, until the plaintiff in that suit had answered the cross bill. He relied on *Ramkissenseat v. Barker*, (a) in which case, the plaintiff

(a) 1 Atk. 19.

[1] A guardian appointed by the Court of Chancery, during the minority of an infant, continues until the infant arrives at the age of twenty-one years, unless removed by the court on good cause shown. The infant is not entitled to come in, as of course, at the age of fourteen, and set aside the guardian at his pleasure. *Matter of Nicoll*, 1 Johns. Ch. Rep. 25. In New York, a guardian appointed by a surrogate, is as much under the superintendence and control of chancery, as if he had been appointed by chancery in the first instance. *Matter of Andrews*, id. 99. As to a quasi guardian, see *Barry v. Barry*, 1 Moll. 213. 1 Russ & M. 500, n. 1.

1838.—Wigley v. Whitaker.

in the original cause being resident abroad, the plaintiff *in the cross [*350] cause moved to stay all proceedings in the first cause, until the plaintiff in that cause had answered the cross bill: Lord Hardwicke there said, "The general rule in this court is not to stay proceedings in an original cause, till the answer comes in to the cross bill, but to stay publication only. *Indeed it would have been of course to stay proceedings in the original cause, if the plaintiff in the cross cause had brought his bill before he had put in an answer to the original bill.*"

He contended that this was precisely the case put by Lord Hardwicke, the plaintiff in the cross bill having brought her cross bill before answering the original bill.

In *Waterton v. Croft*(a) the plaintiff, in what was considered equivalent to the original bill, resided abroad, and it was held that the proper course was to stay the proceedings in the first suit until the plaintiff in that suit had answered the cross bill;(b) and the same practice was followed in *Bourne v. Hall*.(c)

Mr. *Pemberton*, contra, insisted that there was no such practice as that contended for, the effect of which would be, that a defendant might delay answering a bill by means of filing a cross bill against the plaintiff in the original suit; that in *Ramkissenseat v. Barker*, the defendant in the original suit had answered the original bill, and the question was only as to staying the future *proceedings; that what Lord Hardwicke was [*351] reported to have said, with respect to the point now raised, was not called for by the circumstances of the case, and was certainly not in accordance with the present practice. In *Waterton v. Croft*, the question did not arise, nor did it appear whether Croft had not answered the original bill. In *Bourne v. Hall*, publication only was stayed. He referred also to 1 Smith's Practice, 2d edit., p. 465., and *Creswick v. Creswick*.(d)

Mr. *Palmer*, in reply, relied on the cases already referred to, and on the fact of the plaintiff in the original suit being now resident abroad.

THE MASTER OF THE ROLLS:—I own I shall be surprised if I find any such rule as that contended for, which relieves one party from the performance of his duty in answering the original bill, merely by filing a cross bill against the plaintiff. I confess I never heard of such a practice as that stated—of a defendant to an original bill objecting to put in his answer until the plaintiff had first answered the cross bill.

December 13.—THE MASTER OF THE ROLLS, after referring to the cases cited, said that he could not help thinking that the dictum of Lord Hard-

(a) 5 Simons, 502.

(b) On the motion of the plaintiff in the cross cause, it was ordered, that Waterton, the plaintiff in the first cause and the defendant in the second mentioned cause, should be restrained from proceeding in the first mentioned cause, until he should have appeared and put in a perfect answer to the bill in the second mentioned cause. Reg. Lib. B. 1834, p. 96.

(c) 5 Simons, 552.

(d) 1 Atk. 291.

1839.—Pearse v. Catton.

wicke, in *Ramkissenseat v. Barker*, must have been inaccurately reported; that he could find no reported case which justified the present application; and on principle, nothing could be more unjust than to prevent a plaintiff enforcing an answer in his original suit, until he had filed his answer in the cross suit; he must therefore refuse this application, with costs.[1]

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*PEARSE v. CATTON.

1839: March 26, 27.

A testator devised an estate to A., subject to the payment of 5s. a week to B.; and in case B. should leave any children, he charged the estate with the payment of 5s. weekly to such children, until they should attain twenty-one; and he further charged the estate with the payment of 100l. "to the child or children of B., when and so soon as he, she, or they should respectively attain the age of twenty-one," equally to be divided; with a gift over to the issue of any of them dying under twenty-one; B. had one child who attained twenty-one, and B. being still living: Held that the 100l. became raiseable for his child immediately on her attaining twenty-one.

THE testator by his will, dated in December, 1813, devised an estate at Bawdeswell to his son William, subject to the payment of 5s. weekly to his son George for life; and he devised an estate at Shipdham to his son John, charged with the payment of 8s. weekly to George for his life; "and in case George should leave any child or children," he charged the aforesaid messuages devised to William with the like payment of 5s. weekly unto such child or children, until he, she or they should attain twenty-one; "and in case George should have any child or children," he charged the messuages, &c., devised to John, with 8s. a week unto such children, until he, she or they should attain twenty-one. The testator proceeded as follows:—"And I do likewise further charge the said messuages, lands, tenements and hereditaments given and devised unto my said son William, and which were late the estate of my father, and also those which I purchased of Phineas Westmore and Valentine John Flegg, to and with the payment of the sum of 100l. to the child or children of my son George, when and so soon as he, she or they shall respectively attain the age of twenty-one years, equally to be divided amongst them, share and share alike; and in case any of the said children shall happen to depart this life under the age of twenty-one years, leaving issue of his, her or their body or bodies lawfully begotten, then I do give and bequeath the part or share, parts or shares of such child or children so dying under age as aforesaid, to such issue; such issue to have only the part or

[1] The proper time for filing a cross bill, when such a bill is necessary, is at the time of putting in the answer to the original bill, and before issue is joined by the filing of a replication to such answer: and where the defendant neglects to file his cross bill until after issue is joined in the original suit, he is not entitled to an order to stay the proceedings in that suit until an answer shall have been put in to the cross bill, without showing a sufficient excuse for the delay in filing his cross bill. *Irving v. DeKay*, 10 Paige, 319.

 1838.—*Slater v. Willis.*

share, parts or shares which his, her or their father or mother would have been entitled to if living. And I *do likewise charge the said [*353] messuages, lands, tenements and hereditaments in the occupation of my said son John, and herein before given and devised to him, with the payment of the sum of 200*l.* to the child or children of my said son George, when and as soon as he, she or they shall respectively attain the age of twenty-one years, equally to be divided amongst them, share and share alike ; and in case any of the said children shall happen to depart this life under the age of twenty-one years, leaving issue of his, her or their body or bodies lawfully begotten, then I do give and bequeath the part or share, parts or shares of such child or children so dying under age as aforesaid, to such issue, such issue to have only the part or share, parts or shares which his, her or their father or mother would have been entitled to if living."

The testator died in 1815.

George Catton was still living, and the plaintiff, Sarah Pearse, was his only child. She attained twenty-one on the 17th of January, 1838 ; and by this bill, she and her husband claimed to have the sums of 100*l.* and 200*l.* raised out of the devised estates, with interest from the time of her attaining the age of twenty-one.

The defendants insisted that these sums were not raiseable until the death of the plaintiff's father, George Catton, and submitted whether any future child which the plaintiff's father might have, would not be entitled to share in these sums of 100*l.* and 200*l.* ; and whether, regard being had to the whole contents of the will, all the children whom George Catton might leave at his decease and the issue of any deceased child were not entitled to participate in these charges, and whether they were raiseable until the death of George Catton.

**Mr. Pemberton* and *Mr. Elmsley*, for the plaintiff.

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Mr. Kindersley and *Mr. Wray*, contra.

Mr. G. B. Maule, for George Catton, the father.

THE MASTER OF THE ROLLS said he had looked carefully over the will, and he thought that the plaintiffs were entitled to have these two sums of 100*l.* and 200*l.* raised, with interest at 4 per cent. from the time Mrs. Pearse attained twenty-one.

SLATER v. WILLIS.

1838 : July 25, November 6, 7, 10.

Where the members of a trading partnership are interested in a ship, the names of all the partners should appear on the ship's register ; and a ship belonging to a partnership having been registered as belonging to two partners carrying on trade under a particular firm, it was held, that a third partner who formed one of the firm, but whose name was not on the register, had no interest in the ship.

1838.—Slater v. Willis.

THE principal question in this case arose on the construction of the thirty-second section of the ship registration act, of the 6th G. 4, c. 110. The thirty-first section of that act provides, "That, when and so often as the property in any ship or vessel or any part thereof belonging to any of his Majesty's subjects shall, after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel or the principal contents thereof; otherwise such transfer *shall not be valid or effectual for any purpose whatever, either in law or in equity.*"

The way in which such bill of sale is to be made effectual, by [*355] entry in the book of registry and on the *registry itself, is pointed out in the thirty-seventh, thirty-eighth and thirty-ninth sections.

The thirty-second section of the act, after requiring the property in every ship to be considered as divided into sixty-four parts, and the proportion held by each owner to be described in the registry as being a certain number of sixty-fourth parts, provides "*that it shall be lawful for any number of such owners named and described in such registry, being partners in any house or copartnership actually carrying on trade in any part of his Majesty's dominions, to hold any ship or vessel, or any share or shares of any ship or vessel, in the name of such house or copartnership, as joint owners thereof, without distinguishing the proportionate interest of each of such owners, and that such ship or vessel, or the share or shares thereof so held in copartnership, shall be deemed and taken to be partnership property to all intents and purposes, and shall be governed by the same rules, both in law and equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever.*"(a)

The circumstances which gave rise to the questions in this case were as follows :—William Austen Groocock, Edward Lowe and Charles Harris Groocock carried on business as general merchants, under the firm of Lowe & Groocock, and upon the terms of a deed of partnership dated in 1828, Charles Harris Groocock being entitled to a moiety of the capital; Edward Lowe and Charles Harris Groocock were resident and carried on their business in New Brunswick in North America, under the firm of Lowe & Groocock; and William Austen Groocock resided in England, and did not publicly appear as a partner in the business.

[*356] *Edward Lowe and Charles Harris Groocock purchased several ships, called the Maria, the William Pitt and the Prince Lee Boo, with the partnership assets, and which were registered, upon their oaths, under the statute above referred to; (b) and on the registry, the owners of sixty-four sixty-fourth shares of the ships were represented to be Edward Lowe and Charles Harris Groocock, trading under the firm of Lowe & Groocock, being partnership property.

(a) Section 32.

(b) Section 14.

1838.—*Slater v. Willis.*

Messrs. Lowe & Grocock employed Messrs. Willis & Swainson in Liverpool as their agents; and the former being considerably indebted to the latter, Edward Lowe and C. H. Grocock in May, 1834, assigned the ship *Prince Lee Boo*, according to the forms prescribed, to Messrs. Willis & Swainson for moneys then due from Messrs. Lowe & Grocock; and in June in the same year William Austen Grocock, acting under a power of attorney from Edward Lowe and Charles Harris Grocock, transferred the two other ships, namely, the *Maria* and the *William Pitt*, to Messrs. Willis & Swainson for moneys then due from Lowe & Grocock to Messrs. Willis & Swainson.

The two ships, the *Prince Lee Boo* and the *Maria*, were afterwards transferred to persons made defendants to the cause by supplemental bill, who were purchasers for valuable consideration and without notice. The other ship, the *William Pitt*, was wrecked, and the assignees of Willis & Swainson, who had become bankrupts, received the moneys due on the policies on this ship.

In October, 1834, William Austen Grocock became a bankrupt, at which time the partnership was considerably indebted to him; and the plaintiffs, who were his assignees, filed this bill against Willis & Swainson, and a supplemental bill against their assignees and the purchasers from them of the two ships called the *Maria* and *Prince Le Boo*, insisting, in effect, that the transfers by Edward Lowe and Charles Harris Grocock passed only their interest in the ships, and were ineffectual to pass the share of William Austen Grocock; and the plaintiffs, as assignees of William Austen Grocock, claimed his share in the ships; the bill prayed a declaration that the assignments passed the interest only to which Charles Harris Grocock and Edward Lowe might, on taking the partnership accounts, be found entitled, and for consequential directions. [357]

Mr. *Pemberton* and Mr. *Bethell*, for the plaintiffs, contended, that according to the true construction of the act for registering British vessels, any number of several partners named in the registry might hold a ship, "in the name of such house or copartnership," without distinguishing the proportionate interest of each of such owners. That in this case, the ships had been registered in the name of the partnership firm, and by the act must be deemed partnership property, and governed by the same rules, both at law and equity, as related to and governed all other partnership property; in other words, that it was not necessary to insert on the registry the name of all the partners, but that the name of some of such partners coupled with the description of the partnership firm, was sufficient to make the ships partnership property, and to subject them to all the rules, at law and equity, which were applicable to other partnership property; that it was therefore immaterial whether the name of William Austin Grocock appeared on the registry, if the name of the firm appeared there. That the property in the ships being subject to the

 1838.—*Slater v. Willis.*

same rules as affected other partnership property, the law was clear, [*358] that although one partner could bind *his copartners by a bill or other negotiable instrument not under seal, yet that he could not bind his copartners by deed; that the transfer affected the share of William Lowe and Charles Harris Groocock alone, and that the assignees of William Austen Groocock were consequently entitled to his share.

They contended that Willis & Swainson had notice of the interest of William Austen Groocock in the partnership, and that he was in fact a partner at the time when the transfer of the ship in question took place; and they cited *Priddy v. Rose*(a) to show that the assignee of a *chose in action* took it subject to all equities.

Mr. *Kindersley* and Mr. *Walker*, contra, for the assignees of Willis & Swainson, contended, as to the ship the *Prince Le Boo*, that the property in it, whether bought with partnership assets or not, must be considered both at law and in equity, as the property of those persons only, in whose name it had been registered; that it, therefore, wholly belonged to Edward Lowe and Charles Harris Groocock, and passed by their assignment to Messrs. Willis & Swainson unaffected by any equity in favor of their partner.

That the exceptions contained in the thirty-second section, in favor of partners, applied only to such as were "named and described in such registry," and as to such persons, it was not necessary to distinguish their proportionate shares; but that this exception did not in terms relieve nor was it intended that it should relieve partners, from the obligation imposed upon other persons of having their names on the registry.

That as to the other ships, William Austen Groocock had himself concurred in the transfer.

[359*] *They insisted that the positive denial of Willis & Swainson, of all notice of William Austen Groocock being interested in the partnership at the time the transfer took place, had not been rebutted by any evidence.

Mr. *Tinney*, Mr. *Temple*, and Mr. *Tillotson*, for other parties.

November 10.—THE MASTER OF THE ROLLS, after observing that he had read over the act in question, called upon the plaintiffs' counsel for a reply especially as to its construction.

Mr. *Pemberton*, in reply. The plaintiffs contend that William Austen Groocock was a partner in the house, this was proved by the deed, and it is clearly established that Willis & Swainson knew that he was a partner, from a letter written to them by William Lowe and Charles Harris Groocock, wherein he is called "our William Austen Groocock," which in the mercantile language means our partner. [Mr. *Kindersley*. It is positively denied by the answer that they had such notice previous to the transfer.] Then comes the main difficulty in this case; we allege that the ships were partnership property; William Austen Groocock's name was not on the register, the

1838—Slater v. Willis.

names of the other partners were on the register ; and the question is, whether the meaning of the 32d section is, that it shall not be necessary that the share of the individual partners shall appear on the registry, or that the names of all the firm need not appear when the name of the partnership is on the registry. If the latter be the construction, then the plaintiffs contend that the deed executed by the other partners, could not affect the share of William Austen Grocock, because one partner cannot act for or bind his copartner, in any matter which requires the solemnity of a deed, as he can by bill and other instrument not "under seal. That which the other partners [*360] had power to assign, was their share, subject to the claims of their partner ; and if the accounts of the partnership were now taken, it would turn out that William Austen Grocock is entitled to the whole interest in the ships.

THE MASTER OF THE ROLLS :—This bill was filed by the assignees of William Austen Grocock, to establish a claim to certain ships which were registered in the names of Edward Lowe and Charles Harris Grocock, and are alleged to be a part of the property of a partnership consisting of W. A. Grocock, E. Lowe, and C. H. Grocock. The partnership is said to have been constituted by a deed of the 8th of March, 1828, but when it was executed does not certainly appear. It appears that the business was carried on in New Brunswick by E. Lowe and C. H. Grocock, and it was by them that these ships were purchased. They made oath that they were sole owners, and the ships were registered in their names. Willis & Swainson were agents to Messrs. Lowe & Grocock, and they were originally sole defendants to the cause. Various transactions took place between the two firms, and a very considerable balance became due to Willis & Swainson from Lowe & Grocock.

† In 1834 Lowe & Grocock became embarrassed, and Willis & Swainson were desirous of obtaining security for the balance, and two of these ships were assigned to Willis & Swainson as a security ; two of them, the Maria and the William Pitt, by W. A. Grocock himself, who received a power of attorney, and by virtue of that power of attorney, which treated the other partners as sole owners, he made the assignments.

*The question really is whether W. A. Grocock ever had, and [*361] whether his assignees now have any title to the ships ; and it depends on the statute of the 6 G. 4, c. 110. I think it is clear that the names of all the partners must appear on the register ; but the name of the partnership firm may also be added, and then the respective shares in the ship to which the partners are individually entitled need not be defined. In that state of things W. A. Grocock never had a legal title to these ships ; the title was vested in other persons, and it appearing that the plaintiffs have now no equitable title, this bill must be dismissed with costs.(a)

(a) The point decided in the text is referred to in Abbott on Merchant Ships, p. 34, in the following terms :—

 1839.—Cottrell v. Watkins

COTTRELL v. WATKINS.

1839 : March 7, 8.

A good title may be made to an estate, although the origin cannot be shown by any deed or will ; but it must be shown, that there has been such a long uninterrupted possession, enjoyment and dealing with the property, as afford a reasonable presumption that there is an absolute title in fee simple.

Where a matter is referred back to the Master, he is at liberty, without special order, to receive further evidence thereon.

LORD KENSINGTON and the defendant Mr. Watkins, respectively, purchased from the plaintiff certain portions of the tithes of the parish of Langharne, in the county of Carmarthen, and by agreement between the parties, Mr.

Watkins was to give an indemnity against certain charges hereafter [*362] stated which affected *the tithes purchased by Lord Kensington, out of freehold hereditaments of which he was seised in fee simple, with powers of distress and entry for securing the due performance of the indemnity.

By the decree, it was referred to the Master to settle a proper and sufficient indemnity to be given by Watkins to the defendant Lord Kensington, against the costs and charges of repairing the parish church of Langharne, the yearly sum of 65*l.* payable to the vicar of the said parish, the payment of the tenths, subsidies, proxies, synodals, and all other payments, duties, charges, taxes and impositions wherewith the said parsonage was or should be charged or chargeable.

The Master approved of an indemnity on an estate belonging to Watkins producing 100*l.* a year, and to which he reported Watkins had a good title. Lord Kensington took exceptions to the Master's report, first, on the ground that a good title to the property in question had not been shown ; and secondly, that the estate was not of sufficient value.

The estate, it appeared, had been devised to the defendant Watkins by the will of a Mr. Lloyd, who died in 1812 ; and with the exception of this will, no other documentary evidence of title was produced ; but the title was supported by evidence of there being no title deeds, and of the long possession of the testator Lloyd, which was to the following effect :—

A gentleman, who had acted as solicitor for Lloyd for twenty years preceding his death (from 1792 to 1812,) and, since his death, for Watkins, deposed, that during that time "Lloyd was in the possession" of the property, [*363] "as the owner thereof in fee simple, and *deponent verily believed

"The 32d section, before quoted, contains a provision regarding partners in trade, allowing them to be joint owners and making their property partnership property, both at law and in equity ; and it seems that such partners are to be considered as one person only, in estimating the number of thirty-two persons mentioned in the 33d section, which speaks of tenants in common ; probably, also, the name of each partner must be mentioned and described in the registry ; the safer mode certainly will be to name them all in the registry, and this will be the most effectual mode of showing that the whole interest is British."

1839.—Cottrell v. Watkins

him to be such ;" that it was an old family estate belonging to and in the possession of the said J. Lloyd's father during the whole of his lifetime, "as the deponent had been informed and verily believed ;" that on the death of Lloyd he perused his deeds, &c., but no document relating to the estate was found, and that no assurance could now be found to evidence the seisin of Lloyd ; that he had examined the land tax assessments, which were very imperfect ; but that he had found Lloyd's name as proprietor, and Price's name as occupier during the years 1799, 1801, 1802, 1805, 1809 and 1810.

Price, another witness, aged sixty-four, stated he had known the property sixty years and upwards, having lived in an adjoining farm until he was thirty-four years of age. That the farm, from the time when he first knew the same, to the death of John Lloyd, was the property of John Lloyd, and "had been so, as deponent believed, up to the time of his death, for eighty-five years, Lloyd having died at the age of ninety-five years ; that Watkins had been in possession ever since Lloyd's death, and that deponent had been his tenant for seventeen years."

Another witness, aged sixty-two, the son of a former occupier, stated that he lived on the farm from his birth (1774) till 1807, and had frequently seen receipts in his father's possession, given by Lloyd to his father for rent, and that Lloyd was always considered to be the owner of the said premises.

The testator, by his will, devised all his landed property in the hundred of Builth (in which the property in question was situate) to the defendant Watkins, who was his heir at law, and who had been in undisturbed possession since 1812.

*Mr. *Kindersley* and Mr. *J. Romilly*, in support of the exceptions, [*364] contended, that the defendant was bound to give an indemnity upon an estate to which there was a clear unexceptionable title for sixty years, properly evidenced by deeds and other documents ; that it had not, in this case, been shown, what the nature of Lloyd's title was ; he might have been tenant for life, and there might now be remainders vested in persons who were infants or under disability, against whom time would not run, nor the statutes of limitations operate ; that there was nothing to show that Lloyd was not a trustee only of the estate ; that the land tax assessments, though showing the occupation of a tenant, were not evidence of the title of the landlord ; that this estate, the title to which was evidenced by no document, not even by old leases, and was not even referred to, by name, in the will of Lloyd, was insufficient in point of title, for the purpose of indemnity.

They contended, secondly, that the value of the estate was inadequate, as it did not appear what was the amount of dues, &c., payable, beyond the 65*l.* payable to the vicar ; in addition to which the rental might diminish, and the repairs of the chancel might exceed the surplus rents after payment of the 65*l.* and dues.

Mr. *Pemberton* and Mr. *Bigg*, contra, for the defendant Watkins. :—The reference to the Master was not to report whether a good title could

1839.—*Cottrell v. Watkins.*

be made to this property, but to approve of an indemnity to be given to Lord Kensington.

It is not the usual practice to require the same extent or the same
 [*365] accuracy of proof of title, where property *is proposed as an indemnity against a contingent loss, which may never occur, as is necessary in the case of a mortgage or purchase: a purchaser or mortgagee is entitled to have a good marketable title, while for the purpose of an indemnity, a *prima facie* good holding title is sufficient.

The late stat. of the 3 & 4 W. 4, c. 27, has abridged the time during which a party can recover land, the extreme limit is now forty years; the effect of this legislative enactment is to diminish the extent of title formerly necessary to be shown, and now a forty years' title ought to be deemed a marketable title.(a) In all cases there may be outstanding estates, but here there is no suggestion or ground of suspicion that any exist.

Watkins has been in undisturbed possession of the property for twenty-seven years, and there is evidence of reputation of the ownership of Lloyd and Watkins for more than 100 years. It has been decided that the absence of title deeds does not necessarily make a title bad.(b) [THE MASTER OF THE ROLLS. I am far from thinking otherwise.] Conveyancers consider the land tax assessments as evidence of seisin.

Mr. *Kindersley*, in reply, was stopped by

THE MASTER OF THE ROLLS, who said, I think that the evidence here is not sufficient, because it rests upon information and belief; I am perfectly satisfied that there are good titles in which the origin can not be shown by any deed or will; but then you must show something that is satisfactory to the mind of the court,—that there has been such a long uninterrupted
 [*366] ed *possession, enjoyment and dealing with the property as to afford a reasonable presumption that there is an absolute title in fee simple. Now it rests here on the information and belief of this gentleman, without stating the circumstances upon which his information and belief rest: I think that he ought to have stated the circumstances to have enabled the court to judge of them: not to state his belief, but to bring to the court the means of founding a presumption: I do not think that the evidence here is sufficient, and on that ground it is, that I allow these exceptions.

I confess I do not see any reason to think that this property may not be of ample value for the purpose of indemnity. It seems to me that the property is sufficient in point of value; on the other point I think the case must go back to the Master.

Mr. *Kindersley* proposed, that in referring the matter back to the Master to review his report, liberty should be given to receive further evidence.

THE MASTER OF THE ROLLS.—I am of opinion that the Master has a right to do so without special order, and if the parties desire it, he ought to

(a) 1 Sugden V. & P. 330.

(b) 1 Preston's Abst. 23.

1839.—Padmore v. Bodfield.

receive fresh evidence. I believe there has been a difference of opinion amongst the Masters on this point. The doubt arose in consequence of one of the general orders,^(a) which directs that the Master shall not receive further evidence, after issuing his warrant on preparing his report; but it would be absurd to send a matter back to the Master and not let him receive any further evidence upon it.[1]

*PADMORE v. BODFIELD.

[*367]

1839: February 11, 21.

On the 26th of April, 1838, the plaintiff undertook, before replication, to speed; (see the terms;) on the 8th of May, he filed a replication, but he neither sued out a commission nor did he take any further steps: on the 21st of February, 1839, on the motion of the defendant, the bill was dismissed with costs, for want of prosecution.

THE bill in this case was filed on the 29th of August, 1837, and an answer was put in thereto on the 30th of October, in the same year: no further proceedings having been taken by the plaintiff, the defendant, on the 26th of April, 1838, moved to dismiss the plaintiff's bill, on which occasion the plaintiff undertook to speed in the usual form, that is, "it was ordered that the plaintiff should file a replication, serve *subpœnas* to rejoin and obtain and serve an order for a commission to examine witnesses, if he should require such commission, within three weeks from that time; and give rules to produce witnesses and pass publication in Michaelmas term then next, and set the cause down for hearing and serve *subpœnas* to hear judgment in Hilary term 1839; or, in default thereof, that the plaintiff's bill should stand dismissed with costs."

On the 8th of May, 1838 the plaintiff filed a replication; but he neither sued out a commission to examine witnesses nor took any further proceedings in the cause.

On the 11th of February, 1839,

Mr. *Toller*, on behalf of the defendant, moved that the bill should be dismissed with costs, for want of prosecution and for non-compliance with the undertaking.

Mr. *Stevenson*, contra, relied on the fact of the plaintiff's requiring no commission to examine witnesses, as taking the case out of the 16th and 17th general orders of 1831.^(b)

*THE MASTER OF THE ROLLS ordered this cause to stand over to [*368]

(a) 67th order, (1828,) 2 Russ. App. 23.

(b) 1 Russ. & M. 770.

[1] So, in *Twysford v. Trail*, 3 Myl. & Cr. 645, 649. Lord Cottenham said; "I have always been of opinion that the Master is entitled to receive further evidence. It seems to me nonsense to refer it back to the Master, unless he is at liberty to receive further evidence; because the conclusion afforded by the evidence already taken might have been drawn by the court without the assistance of the Master." And see *Livesey v. Livesey*, 10 Sim. 331.

 1838.—Bricknell v. Stamford.

inquire as to the practice; and on the 21st of February, he dismissed the bill with costs.(a)

BRICKNELL v. STAMFORD.

1838: November 26, December 17.

The plaintiff, arrested under an attachment sued out by the defendant, which was afterwards set aside for irregularity, brought an action for false imprisonment against defendant. The court restrained the action and referred it to the Master to settle a proper compensation.

Where a party is arrested by virtue of the process of this court, which turns out to be irregular, he may apply to the court, either for a reference to the Master to settle a proper compensation, or for liberty to bring an action.

A MOTION, made on behalf of the plaintiff, having been refused with costs the costs were taxed, and an attachment for non payment was sued out by the defendant; under this attachment the plaintiff was arrested and imprisoned for a day.

On the 23d of November, the certificate of the Master, together with the *subpœna* and the attachment were set aside, for an irregularity in the mode of taxation; and the defendant was ordered to pay to the plaintiff, his costs, charges, and expenses occasioned thereby, and of the application: the court at the same time intimated, that no action ought to be brought for false imprisonment.

The plaintiff, however, commenced an action against the defendant in the Common Pleas, for the recovery of damages for the false imprisonment.

Mr. *Kindersley* and Mr. *Beales*, on behalf of the defendant, now moved for an injunction to restrain the plaintiff from prosecuting the action at [*369] law, and that the plaintiff might be directed to pay to the defendant *his costs of the application and of the action at law: they cited *Froud v. Lawrence*,(b) *Chalie v. Pickering*.(c)

Mr. *Pemberton* contended, that this was not like the case of an action being brought against an officer of the court; that the plaintiff had a right to commence and proceed with his action, until an application had been made by the defendant to the court to stay the proceedings at law; that the plaintiff was, therefore, at all events, entitled to his costs of this application, and of the proceedings at law to the present time. He said he was not aware of any case, in which an application had been made, in the first instance, by the party irregularly imprisoned, for leave to go before the Master to settle a compensation; and that it was very desirable that it should be known, whether, in the opinion of the court, a party was at liberty to apply before action brought, for a reference to the Master to settle a compensation.

(a) See *Daniell v. Austen*, 8 Simons, 19; *Crooke v. Trery*, 3 Mylne & Cr. 168; 2 Daniell's Ch. Pr. 376, n. [*Strickland v. Strickland*, 4 Beav. 120. S. C. Cr. & Ph. 151. *Darby v. Small*, 1 Hare, 490.]

(b) 1 J. & W. 655.

(c) 1 Keen, 749.

 1839.—The Attorney General v. Wilkinson.

THE MASTER OF THE ROLLS said, that the plaintiff might have come to the court, either for a reference to the Master to settle the amount of compensation for the injury suffered, or for liberty to bring an action, and that he ought to have done so in this instance : that this was a case in which the plaintiff knew, that if he brought an action, the defendant would apply to this court to stay the proceedings, and that therefore the plaintiff could not be allowed his costs at law ; but a reference to the Master ought now to be made, to ascertain what was a proper compensation, by way of damages, for the arrest and imprisonment, which, with the costs of this application, must be paid by the defendant.[1]

“THE ATTORNEY GENERAL v. WILKINSON.

[*370]

1839 : March 15.

A charity was founded “ for the relief of the poor of S. ;” Held, that the charity funds ought to be exclusively applied to the relief of parties not receiving parochial relief.

THE original foundation of the charity which was the subject of this information was not proved ; but it appeared “ that by a decree of the Chancellor of the Duchy of Lancaster and others, the commissioners for compounding with his Majesty’s tenants and copyholders of the manor of Slaidburn, bearing date the 22d of November in the 17th James I., it was, amongst other things, ordered and decreed, that there should be assigned and set out for the copyholders, freeholders and inhabitants within the township of Slaidburn, parcel of the said manor, 550 acres, parcel of the common of Champion, whereof there was to be set out and allotted, *to and for the relief of the poor of the township of Slaidburn for ever*, three-score acres, at the rate of 6d. for every acre.”

This information was filed against the trustees in whom these charity lands were vested, on the certificate of the charity commissioners under the 2 W. 4, c. 57, alleging that the rents of these charity estates had been applied principally towards the relief of poor receiving parish relief, and were substituted for that relief which would otherwise be supplied from the parish funds.

The information prayed a declaration, “ that according to the true intent and meaning of the decree of the 22d of November, 17 James I., those only of the poor of Slaidburn were entitled to participate in the benefits of the charity who did not receive relief from rates assessed for the poor,” and for consequential directions.

“The trustees, by their answer, stated they believed that the income [*371] of the lands was not wholly substituted for that relief which would otherwise be supplied from the parish funds ; and that though that was to a

[1] Vide, *Mackay v. Blackett*, 9 Paige, 437, of which case a full statement will be found, 1 Keen, 753, n. 1, where other authorities are referred to.

1839.—The Attorney General v. Wilkinson.

certain extent the case, there were other cases in which persons would rather forego the relief afforded by the aforesaid application of such income, than go to the workhouse, or in which persons would not receive relief to the same extent from the parish.

Mr. *Pemberton* and Mr. *Blunt* contended that it had been settled by the authorities, that where property was given for the benefit of the poor, it was an improper application of the charity funds, to apply them to the relief of the poor receiving parochial relief, or in aid of the poor rates, by means of which the rich and not the poor are benefited. In *The Attorney General v. Clarke*,^(a) where the gift was to the poor inhabitants of St. Leonard's, Shoreditch, the Master of the Rolls, Sir C. Clarke, after stating that, "as it could not be intended that the poor inhabitants which were relieved by the parish should have benefit by that legacy, which, in effect, would be giving to the rich and not to the poor," declared, that the distribution of the legacies was to be confined to the poor inhabitants of St. Leonard's, Shoreditch, not receiving alms (of the said parish;) and he ordered a scheme to be laid before the Master for such distribution. So in *The Attorney General v. The Corporation of Exeter*,^(b) it was held by Sir John Leach, and afterwards by Lord Lyndhurst, that the rents of lands given "for the aid and relief of the poor citizens and inhabitants of Exeter who were heavily burthened [*372] by fee farm rents of that city and other impositions and *talliaiges,"

ought to be applied to the relief of the poor inhabitants of Exeter not receiving parish relief: Lord Lyndhurst, in giving judgment, observing, "If the rents were given in support of the poor who receive parish relief, they would be applied in aid of the rich." Again, in *The Attorney General v. Gutch*, Reg. lib. A. 1830, fol. 2720,^(c) where the rents of lands were given for the relief of the poor of the parish of St. Clement's in the suburbs of the city of Oxford, it was declared, that such rents ought to be applied to the relief of poor inhabitants of that parish not receiving parochial relief.

Mr. *Walker*, contra, contended that it had never been decided that poor persons receiving parochial relief were to be wholly excluded from the benefit of a charity fund given for the poor; that from the observations of Lord Eldon, during the argument of the case of *The Attorney General v. The Corporation of Exeter*,^(d) it was clear that he entertained a different opinion; and his remarks on a subsequent occasion^(e) showed that he had not changed that opinion; the terms of the gift, too, in that case, were peculiar, being for those who were heavily burthened by fee farm rents of the city of Exeter and other impositions and talliaiges, and must have been the foundation of the order made in that case. In *The Attorney General v. Clarke*, the bequest was to the "poor inhabitants," here the charity was expressly "for the relief of the poor." The foundation of this charity was previous to the statute of the 43 Eliz. c. 2, compelling the parishioners to provide for the poor, and

(a) Ambler, 422.

(b) 2 Russ. 45. S. C. 3 Russ. 395.

(c) Shelford's Mortmain, 628.

(d), 2 Russ. 51.

(e) Page 53.

 1839—Barker and others v. Barr.

there was nothing in that statute to alter the previous mode of application of these charity funds: he also *referred to the cases of *Doe* [*373] *dem. Hindson v. Kerry*(a) and *The Attorney General v. The Corporation of Berwick*,(b) *Wilkinson v. Malin*.(c)

THE MASTER OF THE ROLLS:—I think that the course which has been followed by this court, in a series of cases and for a great length of time, does not leave me at liberty to consider this as an open question. There have been so many cases before this court which have been fully argued and have been acquiesced in, that I do not think that it can now be contended, that those who are in the receipt of parochial relief are entitled to the benefit of a charity intended for the poor. In such cases it was never intended that the charity should directly benefit the rich, although, it is true, that you can in no way benefit the poor without at the same time, to a certain extent, relieving the rich, either as to their legal duty or their moral obligations.

In some of the cases, the charity funds had been applied in aid of the poor rates, and by this mode, in relief of those who were bound by law to pay them, and the court thought it necessary to prevent such an abuse. If an additional gift were made to poor persons who received relief from the parish, there might be no objection to such additional gift; but in some cases which have come before the court, charitable funds of this description have been so applied, that the poor have received merely parish relief, and no additional assistance has been afforded them: it was to prevent this abuse that the court thought right to give the charity funds to persons who, but for such gift, would have received no charitable assistance.

*I apprehend that it was under these circumstances that the rule [*374] was made by my predecessors, and I do not think that I am now at liberty to alter it; the order must therefore be, that this fund ought to be applied exclusively to the poor not receiving parochial relief.

 BARKER AND OTHERS v. BARR.

1839: February 27.

The affidavit in support of a motion to extend the common injunction stated, on belief, that the answer would contain a discovery which, with other evidence, would enable the defendant at law to make a good defence to the action, "or tend materially to reduce the amount of damages sought to be recovered thereby:" Held, that this was sufficient.

Mr. Pemberton and Mr. Purvis moved to extend the common injunction to stay trial, on an affidavit of one of the plaintiffs, which stated as follows: "that he cannot, as he is advised and verily believes, safely proceed to trial of the action in the bill mentioned, until the defendants shall have put in their answer or answers in this suit; and that he expects and believes that the

(a) Duke's Charitable Uses, by Bridgman, 495. (b) 1 Tamlyn, 239. (c) 2 Cr. & Jer. 636.

 1838.—*Reeves v. Gill.*

answer or answers of the defendants will contain a disclosure and discovery which will, with other evidence to be adduced in the action, enable him and the said Richard Barker to make a good defence at law to the said action, or tend materially to reduce the amount of damages sought to be recovered thereby.”]

It will be observed that the portion between brackets is an addition to the common form of affidavit in such cases.(a)

Mr. *Kindersley* and Mr. *Willcock*, contra.

Mr. *Pemberton* in reply.

THE MASTER OF THE ROLLS held that the plaintiffs were entitled to the order on this affidavit.

 [*375]

*REEVES v. GILL.

1838 : December 14, 19.

A. agreed to demise certain premises to B. There was an outstanding equitable interest vested in C.: Held, that B. was bound to accept a demise from A. in which C. joined; and was not justified in insisting on A. obtaining a release from C. in order to enable him alone to make a valid demise.

In December, 1831, Jay mortgaged some property to Coulson, by demise for 1000 years; in 1835, 300*l.* being due thereon to Coulson, she assigned the property for the remainder of the term to Reeves, as a security for 130*l.* In November, 1835, Jay, with the concurrence of Coulson, released to Reeves his equity of redemption in the property, in consideration of Coulson and Reeves releasing him from the mortgage debt of 300*l.*

It appeared, that in Trinity term, 1835, an action of ejectment had been brought against the defendant Gill, on the several demises of Jay, Coulson and Reeves, to recover a portion of the mortgaged premises, of which Gill had by mistake taken possession, and on which he had erected some buildings.

On the 12th of March, 1836, an agreement was come to for compromising this action, one of the terms of which was, “that Reeves, one of the lessors of the plaintiff, *should demise to Gill* all the lands (describing them and being those comprised in the mortgages,) for the sum of 160*l.*, to hold to the said W. Gill for 994 years, at the yearly rent of a pepper-corn.”

This agreement was signed by the attorney of the lessors of the plaintiff, and by the attorney of the defendant Gill.

On the 16th of March, 1836, Coulson died: the defendant Morgan was her legal personal representative; and in consequence of a disagreement [*376] between the *parties as to the form of the lease, this bill was filed by Reeves for a specific performance.

 1838.—Reeves v. Gill.

The defendant Gill insisted, that by the terms of the agreement, the plaintiff *alone* was to grant the lease, and that the plaintiff was therefore bound to obtain a release of the equity of redemption from Morgan, the representative of Coulson, in the first instance, and then grant the lease; while, on the other hand, the plaintiff insisted, that it would be sufficient if Morgan, who was willing to concur, joined in the demise to the defendant.

A question was also raised, as to who was to bear the expense of Morgan's joining in the demise or release.

The cause now came on, neither party having entered into evidence.

Mr. *Tinney* and Mr. *Reynolds*, for the plaintiff.

Mr. *Pemberton* and Mr. *Elderton*, for the defendant Gill.

Mr. *K. Parker*, for the defendant Morgan.

THE MASTER OF THE ROLLS :—This is a case in which the parties have an interest which is extremely small, and the only question is, who is to bear the costs of the suit: there is really nothing else in controversy. I will read the pleadings before I decide that point; I will, however, now state the circumstances. [His Lordship recapitulated the facts of the case and the correspondence between the parties.] It appears to me that the defendant would be equally secure, whether the lease were made by the plaintiff *alone after obtaining a release from Morgan, or whether the demise [*377] were made by the plaintiff and Morgan jointly; and the only question which seems to have arisen between the parties, was whether the costs of Morgan's joining should be paid by one party or the other: to have the matter settled, the plaintiff has thought fit to file a bill and have these expenses incurred.

I think that the right of the defendant, under the agreement, was to have an effectual demise by Reeves for the term of 994 years, and this would have been effected by Morgan's joining in it. This was what the defendant was entitled to, and there must, therefore, be a decree for a specific performance; but it does not follow that the plaintiff ought to have the costs of these proceedings. There has been a great deal of unnecessary litigation, for a matter which would only amount to a few pounds. I will read over the pleadings before determining the question of costs.

Dec. 19.—THE MASTER OF THE ROLLS :—I have read the pleadings and reconsidered the agreement in this case, and am of opinion, that the agreement of the 12th of March, 1836, is so expressed, that the defendant had great reason to consider, that the demise thereby contemplated, was to be made by the plaintiff alone, and consequently, that the expense of the demise, which he agreed to bear, was the expense of a demise to be executed by the plaintiff alone.

Soon after the date of the agreement, it appeared, and it is now properly admitted, that a demise by the plaintiff alone would not have been effectual, by reason of the equity of redemption of the term of 1000 [*378] years being vested in Miss Coulson or her executor; and it is pro

1838.—Reeves v. Gill.

perly admitted by this bill, that the demise which the defendant is bound to accept, is a demise in the making of which the representative of Miss Coulson is to join the plaintiff.

The question arose between these parties, whether the plaintiff ought to procure a release of the equity of redemption; that was the only way in which he could enable himself, individually, to make the demise which he had contracted to do, and it was therefore suggested, as I think, very naturally, by the counsel for the defendant, that the plaintiff ought to procure such release. He refused, and I think that he was entitled to refuse, provided he was willing to adopt another mode of giving to the defendant an effectual demise; and he was so willing, and accordingly offered to procure Thomas Morgan, the representative of Miss Coulson, to join. After some hesitation, the defendant agreed to accept a demise from the plaintiff, directed by Morgan, or in which Morgan joined, provided that the plaintiff would pay the extra expense; and now the only question between the parties was, which of them should pay the extra expense occasioned by the necessity of making Morgan a party to the demise. My opinion is, that according to the true effect of the agreement, and under the circumstances, the extra expense ought to have been paid by the plaintiff; and if the defendant had adhered to his letter of the 16th September, 1836, and the suit had followed, that all the costs of it would have fallen upon the plaintiff. I think that the plaintiff ought not to have refused to pay those extra costs; but having refused, the defendant unfortunately withdrew from his former offer to accept a demise in which

Morgan joined, and again required a release. His letter of the 8th [*379] November was, I think, erroneous, in again asking for a release, but it was expressed in terms showing a manifest disposition to conciliate, and as I think amounting to an offer, that if his mode of settling the matter by release was acceded to, he would pay the costs of it. If there had been an equally proper disposition to conciliate on the other side, I think that this suit would not have taken place; but the plaintiff filed this bill, insisting that the defendant was not entitled to a release of the equity of redemption, but bound to accept a lease in which Morgan joined; and by the answer, the defendant, instead of insisting on the claim stated in his letter of the 16th September, which I think proper, has again insisted that he is entitled to a release; and the substantial question in the cause being, whether the defendant is entitled to a release or bound to accept a lease in which Morgan joins, the defendant has so framed his answer, as to make it necessary for the plaintiff to proceed to a hearing; and, under the circumstances, I think that the plaintiff is entitled to the costs of the suit, but is not entitled to throw upon the defendant the extra costs of procuring Morgan to join in the lease.

Decree, specific performance with costs.[1]

[1] "I also repeat, what I have before stated and acted upon, that, in deciding upon questions of costs, not depending exclusively upon regularity of practice in the strict sense of the word. I shall always consider myself bound to see whether the parties, by reasonable care, might not have avoided the necessity for litigation." *Wigram, V. C., Christian v. Field*, 2 Hare, 185.

1839.—Cotham v. West.

*COTHAM v. WEST.

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1838 : December 22. 1839 : March 22.

A single exception, taken to the Master's certificate allowing four interrogatories, affirmed that "the Master ought not to have so certified, but ought to have disallowed such interrogatories;" Held, that in order to succeed on the exception, it must be shown that all the four interrogatories were improper.

Sums paid by an executor out of an infant's property for his maintenance, cannot be allowed by the Master under a direction "to make all just allowances."

UNDER the decree in this cause, the Master had allowed the plaintiff to exhibit four interrogatories for the examination of the defendant.

The defendant took one exception to this certificate in the following form :—
"For that the said Master hath in and by his said certificate certified, that he has settled and allowed certain interrogatories, which had been exhibited before him on behalf of the said plaintiff, for the examination of the defendants, and had caused the said interrogatories to be engrossed on parchment; *whereas the said Master ought not to have so certified, but ought to have disallowed such interrogatories*; in all which particulars the said defendant doth except to the said certificate."

A question arose, whether, if it were shown that the Master was wrong as to one of the interrogatories, the exception to his certificate would succeed; or whether, under this particular form, the exception must succeed in the whole or fail altogether.

Mr. Walker, in support of the exception.

Mr. Pemberton and Piggott, contra.

THE MASTER OF THE ROLLS was of opinion that this exception challenged the correctness of the whole certificate of the Master, and that, therefore, the exceptant *could not succeed in part; and he overruled the [*381] exception.(a)[1]

The Master was directed to take an account of the rents of the real estates of the testator which had come into the hands of his executor, Thomas West, or to the hands of James Underhill West, his personal representative; and he was to make annual rests and charge interest; and he was also to inquire what purchases and mortgages had been made out of the rents, and whether they were beneficial to the infant plaintiff; and what sum had been properly expended in the repairs of the estate; and the parties were to be examined on

(a) See *Pearson v. Knapp*, 1 Myl. & K. 312, and *Moore v. Langford*, 6 Sim. 323.

[1] As to the general rule that an exception must not cover too much, or embrace unexceptionable matter, see further *Wagstaff v. Bryan*, 1 Russ. & M. 28. Ibid. 31 n. 1. *Buloid v. Miller*, 4 Paige, 474. *Byde v. Masterman*, Cr. & Ph. 265. *Green v. Weaver*, 1 Sim. 404. Ibid. 434, n. 2. *Woods v. Woods*, 10 Sim. 197. Ibid. 218, n. 1, 2. *Ballard v. White*, 2 Hare, 158. *Tench v. Cheese*, post, 571. That an exception may, however, be so far separable as to be allowed in part, and overruled as to the residue, see *Hare v. Johnstone*, 4 Myl. & Cr. 127. 10 Sim. 218, n. 2.

 1839.—Bacon v. Spottiswoode.—Bacon v. Jones.

interrogatories, as the Master should direct, who on taking such account *was to make unto the parties all just allowances.*

James Underhill West, after the death of his father, had made an allowance, out of the rents, for the maintenance and support of the infant plaintiff.

The Master to whom the cause had been referred, was of opinion that he could not, under the terms of this decree, allow the sum expended in the maintenance of the infant, as just allowances; and the case came before the court on the petition of James Underhill West.

THE MASTER OF THE ROLLS concurred in opinion with the Master[1].

Mr. Pemberton, Mr. Kindersley, Mr. Walker, Mr. Piggott and Mr. Torriano, for different parties.(a)

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*BACON v. SPOTTISWOODE.—BACON v. JONES.

1839: May 3, 4.

Where a bill is filed by a patentee for an injunction to restrain an alleged infringement of his patent, the plaintiff is not precluded from asking for an injunction at the hearing, by the fact of his not having applied for it on an interlocutory motion; but the not moving for the injunction imposes on the plaintiff, in such a case, the obligation of making out a clear and unexceptionable title at the hearing: and if he falls in that, and has not previously obtained an injunction, he will not be allowed to use the facts proved in the cause, as evidence of a *prima facie* case, giving him a right to further time, for the purpose of enabling him to establish more satisfactorily his legal title.

A patentee brought the cause to a hearing without having previously moved for an injunction, and the court being of opinion, that on the evidence then produced an injunction would not have been granted on an interlocutory application, refused to retain the bill, to give the patentee an opportunity of establishing his right at law, but dismissed it with costs.

IN this case it appeared that the plaintiff, Hugh Ford Bacon, and a Mr. Hutchinson, had each obtained patents for improvements in the construction of the common argand gas-burner. The plaintiff's patent was granted in July, 1829, and that of Mr. Hutchinson in October, 1834. The invention, in both cases, consisted of an alteration in the interior cylindrical passage, through which the atmospheric air passes to supply the oxygen necessary for the combustion of the inner surface of the jet of gas. In the common argand burner the passage, in its whole extent, forms a cylindrical tube of uniform diameter; the plaintiff's invention consisted, in effect, in placing internally, at the top of this passage, a solid metal ring of peculiar shape, described in the specification as "a cylindrical piece of metal, having a hollow frustrum of a cone formed in it internally, as shown at H (in the diagram.) This frustrum of a hollow cone is inverted, by which means the smallest aperture is placed

(a) Orders were, however, made in this case, by arrangement.

[1] A previous application by petition ought to have been made to the court for an order directing an allowance for the maintenance of the infant. *In re Christie*, 9 Sim. 643. 2 Story's Eq. § 1354. In *Stopford v. Lord Canterbury*, 11 Sim. 82, previous expenditures for maintenance, although unsanctioned, were allowed, under the peculiar circumstances of the case.

1839 — Bacon v. Spottiswoode.

downwards, forming the means of limiting the supply of air to the internal part of the flame; and by making the part from H to G conical or any shape that will permit the air to spread or expand so as to strike or impinge on the flame, a great increase of light will be effected by this additional appendage."

"In Mr. Hutchinson's improvement, the interior air passage was [*383] gradually contracted upwards, in a curvilinear form, until it nearly reached the extremity, and from that point it increased, in a right line, to the top, forming a conical passage; so that the construction of the upper part was in both cases very similar.

The object of both improvements was to produce a more brilliant flame and to diminish the consumption of gas.

The defendants in the first case, who were members of a gas company, caused a quantity of Hutchinson's patent burners to be made by Messrs. Jones and Talby, (the defendants in the second suit,) to the value of 150*l.*, which they supplied to their customers at the same prices as they paid for them.

The plaintiff, considering this to be an infringement of his patent right, filed his bill in October, 1835, against the company, which, after stating the plaintiff's patent, contained this allegation:—"That the defendants have manufactured, or ordered or caused to be manufactured, and have *used* for their own benefit, and sold to divers persons for their own profit, divers large quantities of a certain gas lamp or burner, which they call a double cone burner, and which is a counterfeit or imitation of the aforesaid patent gas-burner in direct and gross violation and infringement of the said exclusive patent right of plaintiff." And after certain charges tending to show the piracy, the bill contained this statement: "That the defendants sometimes pretend, that such counterfeit and pirated gas-burner was not, nor is the same manufactured or ordered, or caused to be manufactured or *used* or sold by them, or for their use, profit or benefit; whereas plaintiffs charge [*384] the contrary of such pretences to be true."

The bill prayed "That the defendants might be decreed to render an account of all the said counterfeit burners, which had been at any time theretofore manufactured or *used* and sold by the defendants, or by any person or persons by their orders, and of all such burners as they still had in their possession; and to pay to plaintiffs all such gains and profits as had been received or had accrued to, or might have been received or have accrued to the defendants, from the manufacture, *use* and sale of the said counterfeit gas-burner, by reason and in consequence of the same being an imitation or counterfeit of the aforesaid improved patent gas lamp or burner;" and for an injunction.

The plaintiffs had already, in August, 1835, filed a bill, similar to this, in form, against Messrs. Jones & Talby, the manufacturers; and the defendants, in both cases, insisted that the making and using Hutchinson's patent burners was no infringement of the plaintiff's patent.

The plaintiffs made no application for an injunction before the hearing; both

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parties went into evidence as to the two patents, and the case now came on for hearing on that evidence and on certain admissions between the parties: the plaintiffs admitting, that the company had sold the Hutchinson burners only to the persons whom they supplied with gas, and had not sold the same to any other persons, and that they "had not derived any profit from the sale of the said last mentioned gas-burners, they having been sold at the same prices as were paid to the manufacturers for the same."

[*385] *Except any inference which might arise from the circumstance of the admitted sale of Hutchinson's burners to their customers, there was no evidence of the company having *used* them.

The two cases were heard in succession; the statements and arguments were very nearly the same in both cases.

Mr. *G. Richards*, Mr. *James Parker*, and Mr. *Humphrey*, for the plaintiffs, contended that Hutchinson's burners, which had been made and used by the defendants, were a mere modification of the plaintiff's, that the plaintiff's invention formed the substratum of the Hutchinson patent, and that so far it could not be used until the plaintiff's patent had expired. *Ex parte Fox*.(a)

They also contended, that there having been an exclusive enjoyment by the plaintiffs of the patent until the piracy by the defendants, it was the practice of the court, in such cases, to grant an injunction in the first instance, without putting the patentee to establish the right by an action at law. *Hill v. Thompson*.(b)

That although it had been admitted that the company had made no profits by the sale of the burners, yet it was clear that they had made a collateral profit from the use of them by their customers; for the evidence showed that a considerable saving in the consumption of gas must have been effected by the use of the improved burners, and that consequently, this case, as against the company, was similar to the case of *Crossley v. The Derby Gas Light Company*,(c) where the defendants, having "used the plaintiff's patent gas meters, and having, by such means, effected a great saving in expense, the court referred it to the Master to take an account of what profits had been received, and what benefit derived from the use of such gas meters as were made or manufactured during the existence of the letters patent, from six years previous to filing the plaintiff's bill down to that time; and the defendants were decreed to pay the amount with all costs.

That the court would grant an injunction where there could be no account. *Universities of Oxford and Cambridge v. Richardson*.(d)

Mr. *Pemberton*, Mr. *Kindersley* and Mr. *Simons*, contra, contended that the plaintiffs' patent was invalid, in consequence of the uncertainty of the specification, and of the nature of the alleged invention; but if not, then that

(a) 1 Ves. & B. 67.

(c) 1 R. & M. 166; 3 Myl. & Cr. 428; and 4 Myl. & K. 72.

(b) 3 Mer. 622.

(d) 6 Ves. 704.

1839.—*Bacon v. Spottiswoode.*

the Hutchinson patent was an independent discovery, and not a piracy of the plaintiffs; that the plaintiffs having neglected to move for an injunction, had precluded themselves from asking for one at the hearing. They insisted this court had no jurisdiction to give a plaintiff a remedy for an alleged piracy, unless he could make out that he was entitled to the equitable interposition of this court by injunction, which the plaintiffs had not done in this case; and that therefore, they were not entitled to any account or relief. No relief had been asked against the Company in respect of the selling, because it had been admitted that they had made no profit thereby, and as to the other relief now asked at the bar, in respect of the benefit which the company might have derived from the use of the burners, no such case had been alleged by the bill, and no evidence existed as to that fact. They insisted, that as the case *now stood upon the evidence, the plaintiff [*387] had not satisfactorily made out his case against the defendants; and that after the laches exhibited by the plaintiffs, they were not entitled to any further delay or to any indulgence from the court, to enable them to make out a case which they had failed in doing upon the evidence at the hearing.

Mr. *G. Richards*, in reply, contended that if any doubt existed, the plaintiff was at least entitled to have an opportunity of showing the validity of the patent at law.

THE MASTER OF THE ROLLS :—I will not now decide the principal question in the cause: but there are two points on which I will now express my opinion. I think that if a plaintiff be entitled to an injunction on the merits and on the evidence produced at the hearing, he is not to be deprived of that right, because he has not moved for an injunction at a previous stage of the cause.[1] The answer may be so speedily put in, and so framed, that it would be perfectly absurd for the plaintiff to move for an injunction, although he might be entitled to an injunction upon the merits at the hearing. The other point is this, that even if the plaintiffs should be entitled to an injunction against the company, they will not be entitled to any account. The bill alleges, that the defendants have sold and used, it being the fact that they have sold for no profit, and it not appearing that they have used otherwise than by furnishing the burners to their customers. I am not prepared to say, that although the defendants have sold the burners without profit, yet that they have not derived a collateral profit from the use of them by their customers: that case, however, is neither alleged by the bill, nor is it proved. Supposing the decision in *Crossley v. The Derby Gas Light Company* to have been correct, I am of opinion that the circumstances of the *two cases are materially different; in that case I think the allega- [*388] tions in the bill were very different from those in the present case; and I am of opinion that, even if the plaintiffs are entitled to an injunction, they are not entitled to an account; and that they are not now to be deprived

[1] Although the plaintiff fails upon the answer of the defendant, to obtain an injunction, he is at liberty to claim it at the hearing *Baily v. Taylor*, 1 Russ. & M. 76.

1839.—Bacon v. Spottiswoode.

of an injunction, because they have not applied for one at an anterior stage. The court will not impute to the plaintiffs the delay in bringing the cause to a hearing, which has arisen from the pressure of business in the court: the plaintiffs in this respect have done all they could, but at the same time it must be observed, that they have not in the mean time brought an action at law to establish their right, although they were aware of the infringement of their patent.

May 4.—THE MASTER OF THE ROLLS :—These two bills were filed to obtain an injunction to restrain an alleged infringement on the plaintiff's patent, and for consequential accounts. When a cause of this kind is brought to a hearing, (an occurrence which does not frequently happen,) it is for the purpose of having an injunction made perpetual or continued during the legal right of the plaintiff under his patent; and it appears to me, that however unusual the circumstance may be, the plaintiff is not precluded from asking for an injunction, by the fact of his not having applied for it on interlocutory motion: but the usual course being, to ask for the injunction as an immediate protection, on interlocutory motion, and the court having then an opportunity of directing such proceedings, if any, as may be required to determine the validity of the patent, it seems, that the plaintiff, if he omits to move for the injunction at an early period in the cause, first shows that he does [*389] *not consider the injunction as immediately necessary for the protection of his interests, and next imposes upon himself the obligation of making out a clear and unexceptionable title at the hearing. It would be very inconvenient, if the plaintiff, having neglected to employ the means in his own power, or which the court would have afforded him to establish the validity of his patent, should be permitted to avail himself of doubts, which he has himself left, for the purpose of obtaining further time to do the same thing which he ought to have done before. I think that at the hearing of the cause, the court has to look at the facts produced in evidence, for the purpose of considering whether a perpetual injunction should then be granted. On an interlocutory order, it has to look at the facts produced in evidence for the purpose of considering whether an injunction should be granted till the right can be tried or further investigated. It is truly said, that where a patent has been granted, and there has been an exclusive possession of some duration under it, the court may interpose its injunction, without putting the party previously to establish the validity of his patent by an action at law; but this interposition must nevertheless depend, to a considerable extent, on the circumstances of the case and the nature of the defence. The court is not bound to grant the injunction, merely because a patent has been granted and exclusively enjoyed for some time; and when the cause is brought to hearing, I apprehend that the plaintiff ought to show his title clearly: and that, if he fails in that, and has not previously obtained an injunction, he will not be allowed to use the facts proved in the cause, as evidence of a *prima*

 1839.—Haldenby-v. Spofforth.

facia case, giving him a right to further delay, for the purpose of enabling him to establish, more satisfactorily, the legal title, upon which alone his equity is founded.

*In this particular case, having regard to the nature of the patent [*390] and the specification, and to the defence, the nature of the alleged infringement, and all the facts which have been now proved, I think that the court would not, upon the same facts, have granted or continued an injunction previously to the validity of the patent being established by an action at law; and therefore, that the plaintiff has not done that, which it appears to me he must be deemed to have undertaken to do, before he set down his cause for hearing;—he has not made out a clear and unexceptionable title; and having failed to do so, the question which I have had to consider in his favor, is whether the bills should be retained for a year, in order to give him an opportunity of now bringing actions; but, for the reasons which I have stated, I think that this ought not to be done; and having regard to the nature of the suit and the sort of jurisdiction which the court exercises in such cases, I am of opinion that the bills must be dismissed with costs.[1]

 HALDENBY v. SPOFFORTH.

1839: March 23, 25.

A trust, "to make sale and dispose of" the testator's real estates, by private sale or public auction, Held, not to authorize a mortgage; there appearing an intention on the part of the testator, that his whole real estate should be converted.

ROBERT HALDENBY, the testator in this case, by his will dated in December, 1809, after giving his dwelling house to his wife for life, she paying a rent of 30*l.* a year for the same, devised all his real estate to Robert Spofforth, Robert Spofforth the younger and John Pierson, in fee; and he also bequeathed to them his personal estate, upon certain trusts for sale, which were in the following terms: "Upon trust that they, my said *trustees, or [*391] the survivors or survivor of them, or their successors to be appointed as hereafter directed, shall and do, as soon as conveniently may be after my decease, *make sale and dispose of* all my said real estates, and all such part or parts of my said personal estate and effects, as shall not consist of moneys or securities for money, and every part thereof respectively, either by private sale or public auction, and in such parcels and lots, and at such time and times as to them, my said trustees, or the survivors or survivor of them, or their successors, shall seem fitting or advisable, for the most money,

[1] In the second of the above cases, (*Bacon v. Jones*), there was an appeal to the Lord Chancellor, which was dismissed with costs. 4 Myl. & Cr. 433; and see *Sheriff v. Coates*, 1 Russ. & M. 159; *Isaacs v. Cooper*, 4 Wash. C. C. Rep. 259.

 1839.—*Haldenby v. Spofforth.*

and best price or prices, that at the time or respective times of such sale or sales, can be reasonably had or gotten for the same, unto such person or persons as shall be willing to purchase the same respectively ; and shall and do convey and assure the same real estates, unto such purchaser or respective purchasers thereof accordingly. And I hereby declare and direct, that the receipt or receipts of my said trustees, or the survivors or survivor of them, or their successors for the time being, shall be a good, valid and sufficient acquittance and discharge, or good, valid and sufficient acquittances and discharges, to the person or persons respectively, who shall become the purchaser or purchasers of all or any part of my said estates hereby directed to be sold, for all or any part of the money to be by him or them paid for the same, or so much thereof as in such receipt or receipts respectively shall be acknowledged to be received ; and that the person or persons respectively, who shall become such purchaser or purchasers, shall not, after paying his, her or their said purchase money to my said trustees, or the survivors or survivor of them, or their successors for the time being, or to his, her or their order, be answerable or accountable for the misapplication or non-application of the same or any part thereof."

[*392] *And he directed his trustees to get in his personal estate, and to apply the moneys "to arise and be produced from the sale and sales of his said real estates, and by and from the rents, issues and profits thereof respectively, in the meantime, and until such sale and sales should be respectively made and perfected," and of the money to arise from his personal estate, in the first place, to pay his debts, &c.; and in the next place, to raise a sum of 3000*l.*, the interest to be paid to his wife for life, and which, after her death, was to be applied in the same way as the residue of the proceeds of the sales ; and in the next place, to pay each of the testator's three daughters the sum of 1200*l.*, and as to all the residue "of the moneys to arise, be produced and got in as aforesaid," to divide the same between his six sons.

The will contained powers of maintenance and advancement ; and also a power for the acting trustees or trustee to appoint new trustees in the place of any trustee who should "depart this life, or be desirous of being discharged from the aforesaid trusts, or should be about to reside beyond the seas, or should neglect or refuse, or become incapable or unfit to act in the said trusts before the same should be fully executed : " and the testator appointed Robert Spofforth, Robert Spofforth the younger and John Pierson, executors of his will.

The testator died in 1815, and his will was proved by Robert Spofforth the younger and John Pierson, the other trustee having declined to act.

By a deed dated in October, 1815, Robert Spofforth the younger and John Pierson, appointed Gervas Seaton a trustee in the place of Robert Spofforth the elder, and the estate of the testator was conveyed to the three trustees on the trusts of the will.

[*393] *By indentures dated respectively the 23d and 24th of August,

 1839.—*Haldeuhy v. Spofforth.*

1822, and made between Robert Spofforth the younger, John Pierson and Gervas Seaton, described as devisees in trust and executors of the will of the testator, of the one part, and Thomas Musgrave, of the other part, Robert Spofforth the younger, John Pierson and Gervas Seaton, by force or virtue of the powers or authorities contained or given by the testator's will, conveyed a part of the freehold property of the testator to Thomas Musgrave in fee, subject to redemption on payment of 1600*l.* and interest.

This bill was filed by two of the testator's daughters whose legacies remained unpaid, and the question was, whether the mortgage to Musgrave was authorized by the power of sale contained in the testator's will.

The mortgagee, by his answer, stated his belief that the 1600*l.* was received by Gervas Seaton, and by him applied to the purposes of the trusts of the testator's will.

Mr. *Pemberton* and Mr. *Kenyon Parker*, for the plaintiffs, contended that it was not a due execution of the power to raise money by mortgage, and that the mortgage was therefore invalid as against the plaintiffs.

Mr. *G. Richards* and Mr. *E. F. Smith*, for Musgrave the mortgagee, contended, that under the above power, the trustees were authorized to raise money by a mortgage, which was a conditional sale; *Mills v. Banks*.(a) That the direction to apply the rents, issues and profits, towards the purposes stated in the will, authorized either a sale or mortgage; *Allan v. Backhouse*.(b) They cited **MLeod v. Drummond*.(c) *Andrew v.* [*394] *Wrigley*.(d) *Braithwaite v. Britain*.(e) *Bonney v. Ridgard*.(g)

Mr. *Barber*, Mr. *Stinton*, Mr. *Purvis* and Mr. *L. Lowndes*, for other parties.

Mr. *Pemberton*, in reply.

March 25.—THE MASTER OF THE ROLLS.—I have looked at the cases cited, and particularly the two authorities of *Mills v. Banks*.(h) and *Allan v. Backhouse*:(i) in the first case, the estates were settled, subject to a trust term of 500 years, to raise 10,000*l.* for younger children, by "rents, issues and profits, or by making leases determinable on one, two or three lives, reserving the ancient rent, or by granting copyholds on fines:" in that case an order was made by Lord Cowper that the money should be raised by a sale of the trust term, but part of it was afterwards raised by a mortgage of that term; and the case having come before Lord Macclesfield on rehearing, he stated that he would not have made that decree; that the case did not materially differ from *Ivy v. Gilbert*.(k) which had been decided on the same principle by him, and affirmed by the House of Lords; but a decree for sale having been made by Lord Cowper, he would not disturb it after eighteen

(a) 3 P. Wms. 1. (b) 2 Ves. & B. 65. (c) 17 Ves. 154. (d) 4 B. C. C. 124.

(e) 1 Keen, 206. (f) 1 Cox, 145. (h) 3 P. Wms. 1.

(i) 2 Ves. & B. 65; affirmed Jacob, 631; approved of in *Bootle v. Blundell*, 1 Mer. 233.

(k) 2 P. Wms. 13. Pr Ch. 583. 2 Bro. P. C. 468.

 1838.—*Eccleston v. Lord Skelmersdale*.

years. Lord Macclesfield also observed that the court had decreed, that the trusts declared concerning the term, empowered the trustees to sell the premises, and a power to sell implied a power to mortgage, which was a [*395] *conditional sale.[1] This I conceive to mean, that where it is intended to preserve the estate, there, under a direction for sale, a mortgage will sufficiently answer the purpose.

In *Allen v. Backhouse*, leaseholds for lives were devised to several in succession, and the testatrix directed the leases to be renewed, and the fines to be raised out of the rents and profits; and it was held, that the fines might be raised by a sale or mortgage.

In the present case, however, the testator desired his trustees, as soon as conveniently after his decease, to sell and dispose of all his real and personal estate; and he declared that the trustees' receipts should be good discharges to the purchasers, who should not be answerable for the misapplication thereof; and they were to get in his personal estate, and to pay, apply and dispose of the money to be produced from the sale, and by the rents until the sale, in payment of his debts, and then in payment of certain sums of money and to divide the residue between six persons.

I think that the clear and manifest intention of the testator was, to have a sale out and out; to have a complete conversion of his real estate, and the produce of the real and personal estate to be disposed of as money; and when he speaks of "rents, issues, and profits," he says rents, &c., until such sale or sales. I think that the terms of this will do not authorize a mortgage, and therefore the mortgagee has not got a valid title.

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**ECCLESTON v. LORD SKELMERSDALE*.

1838: December 21.

Accounts between co-defendants are directed in those instances only in which a case is made out between them on the pleadings, and is supported by evidence.

Where a cause has been set down on bill and answer, accounts between co-defendants were refused.

THE testator in this cause had three estates, called respectively the Searisbrick, the Wrightington and the Eccleston estates, which he devised by his will according to three different sets of limitations; and the question in the suit was, whether, under the shifting clauses contained in that will, the Wrightington and Eccleston estates did or did not, upon Charles Scarisbrick coming into possession of the Scarisbrick estate, go over to his sisters Mary Eccleston and Elizabeth Clifton respectively.

The bill was filed by Mary Eccleston and Edward Clifton and Elizabeth his wife, and their son Thomas Clifton, against the trustees of the will, and

[1] Vide *Ball v. Harris*, 4 Myl. & Cr 267.

1838.—*Eccleston v. Lord Skelmersdale.*

against Charles Scarisbrick, submitting and insisting that the Wrightington estate, by virtue of the provisions of the testator's will, had gone over to, and was then vested in the plaintiff, Mary Eccleston, as tenant for life in possession thereof; and that the Eccleston estate, by virtue of the provisions contained in the said will, had become vested in Elizabeth Eccleston as tenant for life in possession; and it prayed that the rights and interests of all parties, under the said will and codicils thereto, in the said Wrightington estate, subsequently to a term of 2000 years directed to be limited therein, and in the said Eccleston estate, might be declared and ascertained; and that the defendants, the trustees, might be directed to pay and apply the rents and profits thereof respectively, conformably thereto; and that proper directions might be given for making a settlement of the said testator's estates agreeably to such rights and interests; *and that, if necessary, a settlement might be [*397] executed by all proper parties accordingly.

The defendant Charles Scarisbrick insisted that he was entitled to the Wrightington and Eccleston estates.

The cause was set down to be heard upon bill and answer before his Honor the Master of the Rolls, and came on for hearing on the 7th and 8th days of March, 1834, when his Honor declared, that in the events which had happened, upon the death of Thomas Scarisbrick, Charles Scarisbrick having succeeded to the Scarisbrick estate, the plaintiff Mary Eccleston, as the next in order of succession after the limitation to Charles Scarisbrick and his issue, became entitled to the Wrightington estate, and that Elizabeth Clifton, as the next in order of succession to the Eccleston estate, became entitled to the Eccleston estate; and his Honor did order that it should be referred to the Master to approve of a proper settlement to be made of the estates of Wrightington and Eccleston, to the uses, &c., in the will of the said Thomas Eccleston mentioned and set forth, regard being had to the declaration therein before made; and all proper parties were to join in the execution of such settlement as the Master should direct; and it was ordered, that the said Edward Lord Skelmersdale and Streynsham Master, the executors and trustees of the said testator, should account for the rents and profits of the Wrightington estate, from the death of the said Thomas Scarisbrick, to the plaintiff Mary Eccleston, and for the rents and profits of the Eccleston estate, from the death of the said Thomas Scarisbrick, to the plaintiff Edward Clifton, in right of the said Elizabeth Clifton, his wife.

This decree was afterwards affirmed, upon appeal, by Lord Lyndhurst, on the 23d of April, 1835.

*Charles Scarisbrick appealed from this decision to the House of [*398] Lords, who reversed the decree, and declared the appellant, Charles Scarisbrick, entitled to the Wrightington and Eccleston estates for life: and ordered, that the Master, on approving of a proper settlement to be made, should have regard to that declaration: and the costs were directed to be apportioned between the Wrightington and the Eccleston estates, according to

 1838.—*Eccleston v. Lord Skelmersdale*.

their respective values, and that any of the parties should be at liberty to apply to the court of Chancery, to carry the aforesaid declaration and direction into effect, as there should be occasion.

The case now came on upon the petition of Charles Scarisbrick, praying that the Master might be directed to proceed upon the matters referred to him by the decree, having regard to the directions in the order of the House of Lords, and might raise the costs; and that the trustees "might be directed to account for and pay to the petitioner the rents and profits of the said Wrightington estate or Eccleston estate respectively, received since the death of Thomas Scarisbrick."

Mr. *Tinney*, on behalf of the defendant Charles Scarisbrick, contended he was entitled to the accounts prayed for by the petition.

Mr. *Pemberton*, contra, contended, that it was irregular to direct an account to be taken as between co-defendants; he stated that the accounts now asked had been originally introduced into the minutes of the order of the House of Lords, but were struck out by the Lord Chancellor.

Mr. *Walker* objected that there were complicated questions relating to the Eccleston estate, which could not be determined without a supplemental bill.

[*399] Mr. *Tinney*, in reply, relied on *Latouche v. Lord Dunsany*,^(a) in which it was held by Lord Redesdale, and afterwards by Lord Eldon and the House of Lords on appeal, that a decree can be made between co-defendants; he contended, that it was the constant practice of the court to direct an inquiry as between co-defendants, and an account was no more than an inquiry. That here the trustees by their answer had submitted to account.

THE MASTER OF THE ROLLS:—They submitted, I presume, to account to the plaintiffs, the title to the property being then supposed to be in them, but it was afterwards found to be in the defendant. It is a very different thing being called on to account to a plaintiff, and to a co-defendant.

The ground on which an account was given in *Latouche v. Lord Dunsany*, was because a case was made out between the co-defendants, and there were proofs which warranted the order. Here the petitioner attempts to make the trustees chargeable by reading their answer, this a plaintiff is entitled to do, but a co-defendant is not. It would be a very different thing if the right was shown by evidence in this suit.

Take the order according to the prayer, except so far as it relates to the rents and profits.[1]

1 (a) Scho. & Lef. 137. S. C. 2 Scho. & Lef. 690.

[2] Vide *Trevelyan v. White*, post 588. *Goodwin v. Clewley*, 2 Beav. 30. *Brisban v. Boyd*, 4 Paige, 22.

1839.—Long v. Wakeling.

*LONG v. WAKELING.

[*400]

1839 : May 25.

A. B. being entitled to a fund in court, died, and administration was granted to a person, as "the natural and lawful sister" of A. B. It appearing from the proceedings in the cause, that A. B. was illegitimate, the court refused to pay the fund to the administratrix but directed it to be carried over to a separate account, with directions that it should not be paid out of court without notice to the crown.

IN this case a sum of money became payable to a defendant William Barnes ; William Barnes died intestate during the progress of this suit, and letters of administrations were granted to the plaintiff, Elizabeth Long, "as the natural and lawful sister of William Barnes."

This was a petition for payment, amongst others, of the share of William Barnes, to his representative Elizabeth Long.

Mr. *Tinney* and Mr. *Daniel*, for the petitioner.

Mr. *Craig* observed, that it appeared from the proceedings, that William Barnes was an illegitimate child, and that the Crown might therefore be entitled to the fund ; that the letters of administration had been granted to the sister of William Barnes, on the supposition that he was legitimate.

THE MASTER OF THE ROLLS said, that the letters of administration showed a *prima facie* title in the petitioner ;[1] yet it appearing on the face of the document that it was granted on a false suggestion, William Barnes' share of the fund ought to be carried over to a separate account, with directions that it should not be paid out of court, without notice to the Crown.

[1] On an objection to the validity of letters of administration, that the plaintiffs were aliens and residents in England, and had not qualified themselves according to law, to sue here, as administrators ; Kent Ch. said, "the answer to this is, that letters of administration, under the seal of the Court of Probates of this state, are produced, and I am bound to presume *omnia rite acta*, and to give full credit to the judicial acts of a competent jurisdiction. I am not to look beyond the letters of administration *sub pede sigilli*." *Westcott v. Cady*, 5 Johns. Ch. Rep. 343. But in a very elaborate opinion, Knight Bruce, V. C., denied the conclusiveness of a grant of letters of administration, and directed an issue to try the very fact upon which they were granted, viz. whether the plaintiff, the administratrix, was sole next of kin of the intestate. *Barre v. Jackson*, 1 Yo. & Coll. C. C. 585.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE ROLLS COURT.

WILLMOTT v. JENKINS.

1898: December 7.

An executor, who was also trustee, divided the assets: he paid to the adult legatees their shares, and invested the shares of the infants in his own name, but he executed no declaration of trust thereof; he afterwards applied these sums to his own use. Further assets having unexpectedly fallen in: Held, that they ought, in the first place, to be applied in making good the infants' legacies.

THE testatrix, by her will and codicil, gave and bequeathed to the defendant Jenkins and to Sophia M. Smith deceased, the sum of 300*l.*, upon trust to invest the same in the funds, and during the minority of the plaintiff, to apply the dividends towards her maintenance and education; and upon further trust, when the plaintiff should attain twenty-one or be married, that her trustees for the time being should transfer those funds to the plaintiff; and she directed, if the plaintiff should die before attaining the age of twenty-one, or be married, that this legacy should become part of her, the testatrix's, residuary estate; and she gave the residue of her real and personal estate to the same trustees, upon trust to sell and invest the produce, and stand possessed thereof in trust for such of eleven persons (including the plaintiff,) as should attain twenty-one or marry; and she appointed Jenkins and Sophia M. Smith her executors.

[*402] *The testatrix died in April, 1825, and her will was proved by Jenkins and Sophia M. Smith: the latter died in October, in the same year, leaving Jenkins the surviving trustee and executor of the will of the testatrix.

Jenkins paid the debts of the testatrix, and he also paid the legacies given by her will to such of the legatees as were adult; and as he represented, he, as trustee nominated by the testatrix, retained the sum of 300*l.* in respect of the legacy given by the will and codicil to the plaintiff, who was an infant; and on the 16th November, 1825, he invested a sum of 291*l.*, being the amount of the plaintiff's legacy minus the legacy duty, in the purchase, in his own

1838.—Willmott v. Jenkins.

name, of 333*l.* 14*s.* consols, but he executed no declaration of trust of this sum.

The residuary estate of the testatrix was afterwards ascertained, and it was found, that after making provision for the legacies, the share of each of the residuary legatees would amount to the sum of 219*l.*; Jenkins in the year 1826, paid the shares of four of the residuary legatees who had attained twenty-one; and as he represented, the remaining shares were invested by him in his own name, in the funds. No declaration of trust had, however, been executed by him, nor were these purchases clearly traced or identified.

Jenkins afterwards sold out these funds, and in 1829, became insolvent, whereby the whole of these moneys were lost; until that time, however, he had accounted for the amount of the dividends of the sums stated to have been invested, to the parents of the infant legatees for their maintenance.

*In another suit of *Willmott v. Grace*, a sum of money was unex- [*403] pectedly declared to belong to the estate of the testatrix, and the present bill was filed to determine in what order the funds thus recovered were to be applied under the will of the testatrix; the question raised in argument was, upon whom the loss occasioned by Jenkin's breach of trust or *devastavit* was to fall.

No evidence was entered into, but the stock receipt for the purchase of the 333*l.* 14*s.* was produced.

For the plaintiff and other legatees in the same interest it was insisted, that the funds which had thus fallen into the testatrix's estate ought, in the first place, to be applied in payment of the legacies, and then in payment to the unpaid residuary legatees, of their shares of the residue which had been lost by the *devastavit* of the executor.

On the other hand, it was contended by such of the residuary legatees as had already obtained payment of their shares, that Jenkins, the executor, by investing the legacies and the shares of residue which belonged to the infant residuary legatees, in his own name as trustee, according to the direction of the will, had thereby discharged those legacies, or had at least made such an appropriation as bound such legatees; that consequently the loss which had been occasioned by the trustees' defaults ought to be borne by them: and that the amount now recovered for the estate of the testatrix, was therefore divisible between the eleven residuary legatees in equal proportions.

Mr. *Pemberton*, and Mr. *G. Turner*, for the plaintiff.

*Mr *Barber* and Mr. *Lee*, for defendants in the same interest. [*404]

Mr. *Blunt*, for other defendants.

Mr. *Kindersley* and Mr. *Campbell*, contra.

Mr. *Pemberton*, in reply.

Dyose v. Dyose,(a) *Fonnereau v. Poyntz*,(b) *Page v. Leapingwell*,(c)

(a) 1 P.Wms. 305.

(b) 1 Bro. C. C. 478.

(c) 18 Ves. 466.

 1839.—*Davies v. Morgan.*

Ex parte Chadwin, (a) *Williams on Executors*, (b) *March v. Russell*, (c) *Knatchbull v. Fearnhead*, (d) were cited.

THE MASTER OF THE ROLLS:—If an executor makes payments to a legatee in person, or to a trustee for a legatee, or makes such an appropriation as is equivalent to payment, the other persons entitled under the will are not to be called on to contribute for any loss which may afterwards happen to the fund so paid or appropriated.

But if there be no payment, and no appropriation equivalent to payment, I do not see why, if anything afterwards comes to the hands of the executors, it should not be applied in discharge of the legacies of the unpaid legatees.

I must take it, that all these sums were carried to one account and blended together in the name of the executor, so that, in effect, there [405] was no appropriation, "although the executor might have intended it.

The point has been well put, that in cases where an executor is also trustee, and no appropriation is made, one cannot see where executorship ceases and trusteeship begins. I think there was an intention to appropriate, and that such intention was not carried into effect.

I must declare that this fund is applicable, in the first place, in paying the unpaid legacies; and secondly, in satisfying such of the residuary legatees as were infants, and received nothing on the former division; the remainder will then be divisible amongst all the residuary legatees equally.

DAVIES v. MORGAN.

1839: March 13; 14.

Held, that a gift to A. B. "of the sum of 100*l.*, which said sum is owing to me, by bond, from her father," was a specific and not a demonstrative legacy. The obligee of a bond, bequeathed it to A. B.: Held, in a suit by the legatee against the executor, that the obligor was an incompetent witness to prove that the bond was, under the circumstances, irrecoverable against him, and that he was not rendered competent by the 3 & 4 W. 4, c. 42, ss. 26, 27.

THE nature of the plaintiff's case was, that Edward Davies, the plaintiff's father, was indebted to the testator, David Morgan, on bond dated the 1st of May, 1813, in the sum of 100*l.* David Morgan, by his will, made in July, 1822, bequeathed this bond debt to the plaintiff in the following terms:—"Also I give and bequeath unto my grand-daughter, Mary Davies, the sum of 100*l.*, which said sum is owing to me, by bond, from her father Edward Davies."

The testator died in 1822, and his executor, William Morgan, who [406] was the sole defendant in this cause, "proved his will and possessed assets sufficient to pay the 100*l.*

The plaintiff attained twenty-one in November, 1834, and, having unsuc-

(a) 3 Swan. 380. (b) Pt. 3. Bk. 3. § 2. (c) Myl. & Cr. 31. (d) 3 Myl. & Cr. 122.

1839 — Davies v. Morgan.

cessfully applied to the defendant, the executor, for payment of the 100*l.* and interest, she filed this bill in 1836, praying "that it might be declared that the plaintiff was entitled to the said legacy or sum of 100*l.* secured by the said bond," and for an account, and payment with costs.

The defence made by the answer was, that Edward Davies, the plaintiff's father, having made proposals of marriage to Mary Morgan, the daughter of the testator, the testator offered to give her a portion of 250*l.*; but John Davies, the father of Edward Davies, having refused his consent unless the testator would give a larger portion, a secret arrangement, unknown to John Davies, was entered into between the testator and Edward Davies, to this effect: it was agreed, that the testator should give his bonds to Edward Davies, for two sums of 300*l.* and 100*l.*, and that Edward Davies should give to the testator his counter bonds, one for 100*l.* and the other for the sum of 50*l.*, thus making the nominal portion 400*l.*, but the actual portion 250*l.* only.

That the several bonds, dated in 1813, were accordingly given, and being shown to the father of Edward Davies, he consented to the proposed marriage, which afterwards took place; that 40*l.* only had been paid to Edward Davies by the testator in respect of the two bonds of 300*l.* and 100*l.*; that the wife of Edward Davies had by fraud obtained possession of the bond for 300*l.* and delivered it up to the testator; but that the other remained in the possession of Edward Davies, *who insisted that 60*l.*, with in- [*407] terest, remained still due to him thereon from the estate of the testator. The defendant insisted that the legacy was specific; that Edward Davies could not be compelled to pay the bond debt of 100*l.*, it having been given in fraud of the marriage agreement, and that the other bond of the testator might be pleaded by way of set off thereto: by his answer, the defendant also stated, that he had offered to commence proceedings upon the bond against Edward Davies, if the plaintiff would undertake to bear the expenses of the proceedings, which she had declined.

The plaintiff did not enter into any evidence.

The subscribing witness to the two bonds of 300*l.* and 100*l.* was examined on behalf of the defendant; and Edward Davies was also examined on the defendant's behalf to prove the circumstances, stated in the answer, under which, as was alleged, the bond in question had been given, and that the whole amount of the two other bonds and interest, *minus* 40*l.*, was still due to him from the estate of the testator.

The first question was, whether the evidence of Edward Davies was admissible. It was contended for the defendant, *firstly*, that his evidence had been rendered admissible by the statute of the 3 & 4 W. 4, c. 42, ss.

26 and 27,(a) which had been held to apply to courts of *equity; [*408]

(a) Sect. 26: "And in order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action, on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined,

1839.—*Davies v. Morgan.*

Wheat v. Graham; (a) and *secondly*, that the general rule was, that no objection could be made to the competency of a witness, unless he was directly interested in the event of the suit, or could avail himself of the judgment in the cause, so as to give it in evidence on any future occasion in support of his own interest, *Smith v. Prager*, (b) *Bent v. Baker*, (c) which the witness could not do in this instance.

For the plaintiff it was objected, that the statute referred to did not apply to this case, particularly as the judgment "would not be admissible in evidence for or against him;" that the witness had a direct interest in proving his non-liability on the bonds which the plaintiff sought to recover, by enforcing, through the defendant, a demand against the witness.

Mr. *Pemberton* and Mr. *Cole*, for the plaintiff.

Mr. *Girdlestone* and Mr. *Bigg*, for the defendant.

[*409] "THE MASTER OF THE ROLLS:—I cannot admit the evidence; the witness has a direct interest in what he speaks to, and in making out that this bond ought not to be enforced against him. (d) It is not, however, on the ground that the degree would be admissible in evidence for or against him; [1] upon a proper occasion it may have to be considered how far the statute affords a rule which this court ought to follow.

The next point was, whether, under the terms of the gift, this legacy was a specific or demonstrative legacy.

For the plaintiff it was contended that it was a demonstrative legacy, or a pecuniary legacy with a fund pointed at, out of which it was to be paid, and that, therefore, it did not fail, even if the fund failed, but was payable out of the general personal estate; *Fowler v. Willoughby*, (e) *Campbell v. Graham*, (g); that the executor was chargeable for his negligence in not realizing

but in that case a verdict or judgment in that action in favor of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him."

Sect. 27: "And be it further enacted, that the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be endorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such endorsement or entry shall be sufficient evidence that any such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

(a) 7 Sim. 61.

(b) 7 Term Rep. 62.

(c) 3 Term Rep. 27.

(d) See *Holden v. Hearn*, post. [445.]

(e) 2 S. & Stu. 354.

(g) 1 Russ. & Myl. 453.

[1] To render a witness incompetent, it is not necessary to show that the record of judgment against the party calling him, would be evidence against the witness in a subsequent suit. It is sufficient if the witness will be discharged by a decision in favor of the party calling him. *Woods v. Skinner*, 6 Paige, 76. That the witness is a party to the instrument (unless, perhaps, in the case of negotiable paper) sought to be impeached, is not alone, a reason for excluding his testimony. *Topping v. Van Pelt*, 1 Hoff. Ch. Rep. 549.

1839.—*Davies v. Morgan**

the amount due on the bond; *Powell v. Evans*; (a) that the statements in the answer had not been proved, and if true, would only show, that the bonds had been set off one against the other, and the estate of the testator, having thus received a benefit, was to that extent liable to make good the claim of the plaintiff.

For the defendant, on the principal point, it was argued, that the gift was a specific gift of the bond itself and of the amount due on it, and that the bequest failed by the circumstance that the bond could not be enforced; that it had been so treated in the prayer of the plaintiffs' bill; *Gillaume v. Adderley* (b) was cited.

*Mr. Cole, in reply:—The defendant has abstained from taking [*410] proceedings for the recovery of the bond during the infancy of the plaintiff, as he was bound to do, in order that he might not render the residuary estate, in which he was interested, liable for the expenses; he has allowed the statute of limitation to operate, (c) and has, therefore, made himself personally liable to the plaintiff.

THE MASTER OF THE ROLLS:—The bill in this case was filed to recover a legacy of 100*l.*, bequeathed by the will of David Morgan, which was made in the year 1822, whereby he gave the legacy in question in the following terms: "I give and bequeath to my grand-daughter, Mary Davies, the sum of 100*l.*, which said sum is owing to me by bond from her father, Edward Davies. The first question is, whether this is a specific legacy or a demonstrative legacy, [1] and I am of opinion that it is a specific legacy; for these words "which said sum is owing to me," show distinctly that it was the sum owing on the bond which was specifically bequeathed. (d) Whether the bond

(a) 5 Ves. 839.

(b) 15 Ves. 384.

(c) 3 & 4 W. 4. c. 42. s. 3.

(d) See *Innes v. Johnson*, 4 Ves 568, and *Gardner v. Hutton*, 6 Sim. 97.

[1] As to what constitutes a demonstrative legacy, Leach, V. C., speaking of the case then before him, says; "that this was neither a *legatum nominis* nor a *legatum debiti*, but a pecuniary legacy with a particular security, which in the civil law was termed a demonstrative legacy, and that our law followed the civil law in giving effect to such a legacy, where the particular fund intended by the testator happened to fail." *Fowler v. Willoughby*, 2 Sim. & Stu. 358. In further illustration of the distinction between a demonstrative and specific legacy, see *Colville v. Middleton*, 3 Beav 570, stated 1 Russ. & M. 461, n. 1. In that case the legacy was held to be demonstrative, and the Master of the Rolls refers to the *Attorney General v. Parkin*, Ambler, 566, as a case much stronger than the one before him. "There, (i. e. the case in Ambler,) a testator enumerated mortgages, bonds and notes due to him, and gave out of the interest an annuity to A. for life, and after her death directed the securities to be vested in trustees for charitable uses. Some of the securities were paid off, and new securities taken after the will; the bequest was held to be demonstrative and not specific." But, on the other hand, where a testator bequeathed the sum of 4000*l.* capital stock in the 3*l* per cent. consols, or in whatever of the government funds the same should be found invested, the bequest was held to be specific. Knight Bruce, V. C., says: "The question is, whether this legacy is merely demonstrative, or specific. It has always been held that a legacy of stock out of stock is specific, being the gift of part of a specific fund. Here the testator intimates an intention that the stock shall be taken, not out of his general personal estate, but out of whatever government fund he may possess; therefore only government funds are to be resorted to. It is not a bequest of money out of stock, but stock out of stock. It is a specific bequest, &c." *Hosking v. Nicholls*, 1 Yo. & Coll. C. C. 478.

 1838—MORRIS v. TIMMINS

was valid or not might be a question; but it cannot be maintained that the executor was bound to pay the amount if it could not be recovered—that is the question in this case.

The bond has been produced by the plaintiff, and *prima facie* it is a valid bond, but circumstances are stated in the answer, which, though not proved, throw considerable doubt upon the matter. The defendant, though he has not proved it, has alleged that the bond was given under such circumstances that it could never be enforced, and if *so, this legacy could never be paid; I am to decide whether the evidence is sufficient to show that this bond could be enforced. The defendant, by examining a witness who is not competent, has failed in proving his allegations; but there is sufficient to say, that in deciding this case, I cannot be satisfied with the mere production of the bond. I regret that a suit should have been instituted on the subject, and more so that there must be further proceedings; I must, however, direct an inquiry, whether this bond, at the time of the testator's death, was a valid bond, and could have been enforced, and if the defendant, with due diligence, could have recovered the amount due on the same.

MORRIS v. TIMMINS.

1838: November 20, 21.

A. being entitled to an undivided moiety of a piece of ground, agreed with B. that in case either of them should at any time purchase the other moiety, the whole should be divided in a particular manner between them; the moiety was sold to a third party, whereupon A. and B. further agreed that neither of them would purchase that moiety until they had agreed upon a sum to be given for it, subject to the stipulations and conditions of the former agreement. A. afterwards refused to agree upon the price to be given, and B. having purchased the moiety of the property, A. refused to carry the agreement into effect: Held, that A. was not justified in refusing to fix a price; and a suit having been instituted against him by B. for a partition of the property: Held also, that A. had abandoned the contract, and could not set it up as a bar to the partition.

In a partition suit, costs, as at law, are not given on either side at the hearing; but where a defendant set up an agreement in bar of the right of the plaintiff to a partition, he was directed to pay so much of the costs as were occasioned by that part of the defence.

A road was set out by two tenants in common of property, for the convenience of their respective dwelling houses for ever; the court, in a partition suit, though of opinion that it ought not to be interfered with, declined giving any special direction on the subject to the commissioners.

IMMEDIATELY adjoining the respective dwelling houses of the plaintiff and of the defendant, in Carmarthen, there was a vacant piece of ground, [*412] of *which the defendant and the representatives of a Mr. Waters were seised in undivided moieties as tenants in common.

The moiety belonging to the representatives of Mr. Waters being about to be sold by auction, the plaintiff and the defendant, on the 30th of January, 1819, entered into an agreement, that in the event of the defendant being the purchaser thereof, at the sale by auction or at any future period, either

1838.—*Morris v. Timmins.*

directly or indirectly, then he would sell a particular portion thereof described in the agreement to the plaintiff, the plaintiff paying for the same *pro rata*, according to the price the moiety might be sold for at the auction or otherwise; and the plaintiff "agreed to the terms and conditions before stated, and further, that in the event of his becoming the purchaser of the aforesaid moiety belonging to the late Mr. Waters, by auction or by private contract directly or indirectly, then that he would give up the said purchase to the defendant upon the terms he purchased the same, the defendant performing the agreements and covenants aforesaid." The agreement contained stipulations as to the boundary walls, the title and the expense of the conveyance.

The property was not bought either by the plaintiff or the defendant, but was purchased by Sir Henry Protheroe; whereupon a further agreement was entered into between the plaintiff and the defendant, which was endorsed on the former one, and was expressed as follows:—"The piece of land alluded to in the within written agreement having been purchased this day, by public auction, by Sir Henry Protheroe of Bristol, at an exorbitant price, it is further agreed between the said Aaron Timmins and Thomas Morris, that neither of them will purchase the same of the said Sir Henry *Pro- [*413] theroe, or of any other person, until the said Aaron Timmins and Thomas Morris have agreed upon a sum to be given for it, subject to the stipulations and conditions in the written agreement."

In July, 1832, the agent of Sir Henry Protheroe offered to sell to the plaintiff his moiety of the plot of ground, but the plaintiff declined, on the ground of the agreement existing between him and the defendant; the agent shortly after called on the defendant, at the request of the plaintiff, and requested him to come to some arrangement or agreement relative to the plot of ground, and to fix a price to be given for the purchase of it, and to carry the agreement into effect, when the defendant objected to the title, and said, "he had no objection to divide the said plot of ground with Sir H. Protheroe, provided he should have the part of the plot of ground that was nearest to or joined the complainant's house." Another person called on the defendant, at the request of the plaintiff, and asked what price, under the agreement, should be offered for the property, to which the defendant answered, "that he would not fix, upon any price at which the said plot of ground should be purchased, as he had come to a determination to divide the said plot of ground."

On the 17th of April, 1834, the plaintiff agreed to purchase the property of Sir H. Protheroe, and on the following day he sent to the defendant to inform him of the purchase, and that he was then ready to carry the agreement between them into effect, when the defendant, in answer to the communication, stated, "that the plaintiff had forgotten his honor, and broken faith with him" the defendant; and he added, "that he would have nothing to do with the plaintiff, but that he would divide the plot of ground yard by yard."

*The plaintiff filed this bill in September, 1835, against Timmins, [*414]

1832.—*Morris v. Timmins.*

insisting that the defendant had abandoned the agreement, and that it was no longer binding on the plaintiff, and praying for a partition of the plot of ground, with an alternative prayer for a specific performance of the agreement if the court should think it binding upon the plaintiff.

Mr. *Pemberton* and Mr. *Willcock*, for the plaintiff, asked for the usual decree for a partition.

Mr. *Kindersley* and Mr. *G. Richards*, for the defendant, objected that the plaintiff was not entitled to have a partition of the property, on the ground, that by the agreement between the plaintiff and the defendant, neither of them was to purchase the moiety belonging to the representatives of Mr. *Waters* until they had agreed upon a sum to be given for it.

THE MASTER OF THE ROLLS:—In this case it appears that a piece of ground, situate between the houses of the plaintiff and defendant, belonged to the defendant and to the executors or trustees of a person of the name of *Waters*, as tenants in common; and that the interest therein of *Waters* being about to be put up for sale, the plaintiff and defendant entered into an agreement to become respectively entitled to different portions of this ground, and to carry their intentions into effect by purchase, and by subsequent partition and division; and on the 30th of January, 1819, being the morning of the intended sale, an agreement in writing was entered into, whereby it was stipulated that the defendant should bid at the sale, and that in the event of his becoming the purchaser of the moiety of the land in question, he [*415] should convey a portion of the whole of such land to the plaintiff; and that, if the plaintiff should become the purchaser, he should give up his purchase to the defendant, the defendant performing the covenants of such written agreement.[1]

At the sale by auction Sir *Henry Protheroe* became the purchaser at the sum of 450*l.* which being considered an exorbitant price by the plaintiff and defendant, they entered into another agreement in writing, that neither of them would purchase the same of Sir *Henry Protheroe* or any other person, until the plaintiff and defendant had agreed upon a sum to be given for it, subject to the stipulations and conditions in the former written agreement.

The plain intention of the latter agreement was that neither the plaintiff nor defendant should prejudice the other by given an exorbitant price; the object was to carry out the first agreement without prejudice to either party; it is expressed, that unless the two should agree, it was not the intention of the parties to enable either to put an end to the first agreement, but it prevents the putting the first agreement in force, by payment of an exorbitant price to the prejudice of either party.

The agreement was entered into on the 30th of January, 1819, and no dispute arose between the plaintiff and defendant until 1832. In the early part

[1] Was not this tantamount to an agreement between the parties not to bid against each other at the sale at auction? *Quere.* As to the illegality of such agreements, see *Hawley v. Cramer*, 4 Cow. 718, 732.

1838.—*Morris v. Timmins.*

of that year, Sir Henry Protheroe being desirous of selling the interest in the ground in question, which he had acquired by purchase, made an offer thereof through his agent Thomas, to the plaintiff, which is proved by the evidence of Thomas. The plaintiff, upon receiving this offer, had immediate regard to his agreement with the defendant, and having regard to that agreement, he *desired Thomas to communicate with the defendant; [*416] communication was had with the defendant, who, it appears to me, did not refuse, but evaded the subject: he said there was some difficulty on the title; I do not understand what it was; but the consequence was, that the offer of Sir Henry Protheroe made in the beginning of 1832 was not acted upon.

In the year 1833, it is stated that an offer of sale was made by Sir Henry Protheroe to the defendant, and the letter containing it has been produced.

It is stated by Thomas, that from 1832 to 1834 he repeatedly applied, at the instance of the plaintiff, to the defendant, to enter into an agreement to accept the offer of Sir Henry Protheroe, and that these communications ended in this, that the defendant said he would divide the plot of ground with Sir Henry Protheroe on certain terms, namely, that his portion should be on the side of plaintiff's house: this is positively sworn to; his object was to exclude Morris altogether from that portion of the ground.

On the 21st of February, 1834, the plaintiff sent Aubrey to communicate with the defendant on the subject of the offer; and upon that occasion the defendant in answer said he would not agree to any price, that he intended to divide the land with the owner of the other half. Sir Henry Protheroe had a right to transfer his interest in the property, and, under the first agreement, the plaintiff had a right to accept the transfer: by the second agreement either could prevent the other giving an exorbitant price for the land, but I am of opinion that the defendant had no right to say, "this agreement shall never be carried into effect, because I will never agree on a price; I will not only prevent the performance *of the agreement, but will [*417] prevent you from ever becoming owner of the land either with me or independently of me." The consequence of this refusal on the part of the defendant was, that the plaintiff entered into a separate agreement with Sir Henry Protheroe, dated the 17th April, 1834, to purchase the property for 350*l.* having been compelled to do so or be excluded for ever. Even after the purchase, the plaintiff was desirous of having the agreement carried into execution, and he sent his son to the defendant to tell him so; but the defendant replied, "that the plaintiff had forgotten his honor, and broken faith with him," and added "that he would have nothing to do with the plaintiff. but that he would divide the plot of ground yard by yard." The defendant therefore rejected the agreement, because he considered that plaintiff had not observed the second memorandum of agreement, which stipulated that the price should be first agreed upon between them; the defendant in effect says to the plaintiff. "You have not performed the agreement, and although I was

1838.—*Morris v. Timmins*

the cause, I will divide the land yard by yard." Some negotiation between the parties took place after this, and we have the evidence of Jones, who is the solicitor of the defendant, who says that the defendant in April, 1835, gave notice that he would dispute any conveyance of the moiety from Prothro to the plaintiff, on the ground of the agreement whereby one was not to purchase without the consent of the other, and the defendant then stated "that he would stand by the agreement," which prevented one purchasing without the other.

I think in this respect the defendant was wrong, and the question is, whether he has not rejected the other agreement: I think he has abandoned the agreement, and is not entitled to the benefit of it.

[*418] *The plaintiff is entitled to a partition: then comes the question as to costs, as to which there is some difficulty. The plaintiff claims a partition, and has suggested the agreement in his bill as a thing which might beset up by the defendant. The defendant says there is an agreement which prevents the plaintiff claiming any right to a partition, because he had no right to purchase—he disputes the right to a partition, and therefore this is not a common partition suit, where, as at law, no costs are given on either side at the hearing.(a) This is a case in which the right to a partition is disputed by reason of an agreement which is set up in bar: this takes it out of the common case. I am of opinion that the defendant is not entitled to the benefit of the agreement which he has relied on, and as costs have been incurred thereby, he ought to pay such portions of the costs as have been occasioned by setting up the agreement.[1]

The bill stated that a road or carriage way had been set out by Thomas Waters and the defendant over part of the land, for the convenience of their respective dwelling houses forever. This was admitted by the answer.

Mr. *Kindersley*, on behalf of the defendant, asked that special directions might be given to the commissioners, that in making the partition, this right of road should not be interfered with.

Mr. *Pemberton*, contra.

[*419] *THE MASTER OF THE ROLLS:—The setting out of the road is stated in the bill and is admitted by the answer, and I think it ought

(a) See *Beames on Costs*, 48. *Seaton on Decrees*, 187, 188. *Agar v. Fairfax* 17 Ves. 533.

[1] "The complainant in his bill, claimed a small piece of land which did not belong to the parties in common; and he made an unfounded charge against the defendant, as to his having agreed not to erect any mill on the part of the premises conveyed to him, which should interfere or come in competition with the business of the complainant. But the defendant, on the other hand, set up in his answer, an agreement that the dam and pond should be forever held in common for the use of the mills of both parties, so long as such mills should be holden in severalty, and as to a particular mode of using the water, which allegation in the answer is equally unsustained by proof. There was no impropriety, therefore, [in the decree of the Assistant Vice Chancellor,] in leaving both parties to bear their own costs in relation to those matters, and as to the proofs which related to matters in controversy between them, not affecting the right to partition." *Walworth, Ch. Smith v. Smith*, 10 Paige, 480.

1839.—*Spire v. Smith.*

not to be interfered with; but I do not think that I ought to give any special directions by the decree.

SPIRE v. SMITH.

1839: May 28.

Several annuities given by will and codicils, held to be cumulative.

THE question in this case was, whether certain annuities, given by the will and codicils of the testator, were cumulative or substitutional.

By his will the testator gave as follows:—"I give to Mr. William Spire, of Laverton, in the parish of Buckland, in Gloucestershire, 20*l.* per annum for and during his natural life, and should he die before his present wife, at his demise I will that she shall have 50*l.* for herself, in order that she may bury him gentlemanlike with that sum. I will that my executors shall so arrange matters, that he may receive those payments quarterly, without failure even once."

By a second codicil to his will, the testator gave as follows:—"1837, July 20th, I give to William Spire, of Laverton, in the parish of Buckland, in Gloucestershire, the sum of 10*l.* per annum, for and during his natural life; and I give to his present wife, for and during her natural life, independent of him, unless jointly their each 10*l.* be united for their mutual comfort."

*And by the fourth codicil, he gave in the following words: [*420]—"8th September, 1837. If my God should take me off suddenly, it is my wish that my executors should provide of William Spire, of Laverton, Gloucestershire, and his now wife, 10*l.* each per annum more than I have given them by my will. Jeremiah Knill."

Mr. *Stinton*, for the plaintiffs, William Spire and his wife, argued that the annuities were cumulative and not substitutional, and claimed the several annuities given by the will and two codicils.

Mr. *Koe*, for the executors, contra.

THE MASTER OF THE ROLLS.—It is difficult to say what the testator intended; but the inclination of my opinion is, that all the annuities take effect, [his Lordship read the will,] so that the husband is to have 20*l.* a year for life, and the wife after his death is to have 50*l.* for a particular purpose, namely, to bury her husband. Then comes the second codicil [his Lordship read it.] He has not distinctly given 10*l.* a year to the wife, but has done it by implication, for it is impossible not to see that he intended to give it to her, for he speaks of *their each 10*l.* a year*. He has given to each 10*l.* a year, that to the wife being independent of her husband, or giving to her a power over it, and this therefore cannot be substitution for the gift by the will [his Lordship read the fourth codicil.][1] By the fourth codicil, he gives to the husband

[1] "In cases where there have been slight variations only between the legacies given by a

1839.—In re Chilcote.

and wife, "10*l.* each per annum more than he had given them by the will:" the annuity to the wife is not given by the fourth codicil, in the same way in which the annuity was given by the second codicil, or independently of her husband, and is not a substitute for it. The case is not free from doubt; but my impression is, that the testator has not used words of [*421] "substitution, and that all the bequests take effect. The 10*l.* a year given to the wife by the second codicil must be paid to her separate receipt.[1]

IN RE CHILCOTE.

1839; May 25.

A bill of costs having been incurred by A. and B. jointly, and an action having been brought against them for the recovery of the amount, the court refused to direct a taxation and to stay the proceedings at law, on the undertaking of A. alone, to pay what might be found due.

THIS was a special petition, presented by Mr. Pearman, for the taxation, of his solicitor's bill: it stated the retainer by the petitioner, and the delivery

will, and those given by a subsequent instrument, the court has held that the latter were meant to be substitutions for the former. But in this case there is a manifest difference between the legacies given by the testamentary paper, &c." Shadwell, V. C. *Strong v. Ingram*, 6 Sim. 209.

[1] Whether a gift, in the absence of express direction, is to be deemed cumulative upon, or substitutional for, a previous gift, is necessarily a question of construction. If the two gifts occur in the same instrument;—if in distinct instruments, as in a will and codicil;—if something is annexed to the subsequent legacy, either by way of enlargement, as in the case in the text, or by restriction of the power of the donee;—if the sums given are equal in amount or different;—these, and innumerable other considerations must often be taken into view in deciding cases of this description. "In cases of this kind," Lord Eldon said, "there is always a degree of doubt and difficulty, greater or less; and it depends entirely upon the judge, before whom the case comes, to say, what he conceives the intention of the testator to have been." *Mackenzie v. Mackenzie*, 2 Russ. 274. So, in a case in which the legacy in a codicil was held to be cumulative, Lord Brougham said; "In questions of this kind the light to be derived from decided cases is of less importance than in most others. The object being in each instance to ascertain the intention of the testator, and the means to be used for this purpose being the examination of what he has said, and not conjecture and arguments founded on probability, it is clear that almost every thing must depend upon the particular circumstances, that is, upon the very words of the instruments; and that the least variation in these may produce a wide difference in the result. The general resemblance of cases may carry us a little way towards a principle or rule of construction; but, unless the circumstances are the same, or nearly the same, there will arise as much difficulty in applying the former rule, as in making a new one." *Guy v. Sharp*, 1 Mylne & K. 603. "Decisions upon particular wills are of far less consequence now, than they formerly were supposed to be; unless, indeed, where the leading provisions are almost identical, and the facts substantially alike. They now furnish, not so much authorities, as analogies by which to interpret the words of wills in new cases." Story, J. *Blagge v. Miles*, 1 Story's Rep. 445. And see further as to the value of authorities in questions of construction, what is said by Walworth, Ch. in *Rathbone v. Dyckman*, 3 Paige, 26, and by McCoun, V. C. in *Kingland v. Rapelye*, 3 Edw. Ch. Rep. 6, quoted 3 Myl. & Cr. 613, n. 1. *Vaughan v. The Marquis of Headfort*, 10 Sim. 641, and n. 1, *ibid.* As to gifts, when cumulative or substitutional, see further *Fraser v. Byng*, 1 Russ. & M. 91, 102, n. 1. *Guy v. Sharp*, 1 Myl. & K. 589. *Mackinnon v. Peach*, 2 Keen, 555, 563, n. 1. *Radburn v. Jervis*, 3 Beav. 450. *Strong v. Ingram*, 6 Sim. 107. 2 Russ. 274, n. 2. 3 Russ. 157, n. 1. *Tweedale v. Tweedale*, 10 Sim. 453.

1839.—*In re Chilcote*.

by the solicitor of his bill, amounting to 806*l*. The petition also stated, that the solicitor had received money on account of his bill, amounting to 377*l*., and retained the papers, &c., of the petitioner, and that the costs were unreasonable.

The petition prayed for the taxation of the bill, the petitioner submitting to pay what might be found to be due, and that all proceedings might be stayed in the meantime.

It appeared by an affidavit, filed in opposition to the petition, that from 1832 to 1834, the solicitor had been employed by the petitioner Pearman alone, during which time bills of costs, amounting to 104*l*., had been incurred; and that from September, 1835, to October, 1838, the petitioner Pearman, and a Mr. Jay jointly employed the solicitor, during which period bills of costs, amounted to 702*l*., had been incurred on their joint retainer; and that during such employment, the solicitor had received from Mr. Jay 377*l*. on account.

That the solicitor, in order to enforce the payment of the bills due to him from Jay and Pearman, on their *joint retainer, brought an [*422] action at law against them, in which they had appeared separately and pleaded to the action.

The affidavit further stated, that Jay was the only responsible party to whom the plaintiff could look for payment of the costs due jointly from Jay and Pearman.

Mr. *K. Parker*, in support of the petition, cited *In re Murray*(a) to show that the possession by the solicitor, of deeds was a sufficient ground for the taxation of his bill.

Mr. *Flather* objected, that the bills incurred on the joint retainer could not be taxed on the undertaking to pay of one client only, and in the absence of the other; the solicitor would thus be deprived of the benefit of the undertaking of the only responsible party.

Mr. *K. Parker*, in reply, contended that it was not necessary that there should be a joint undertaking, for in that case, one party might lose the benefit of a taxation, because the other refused to join in the application.

THE MASTER OF THE ROLLS said, that no such case had been alleged: that this was an application to tax a joint bill of costs in the absence of one of the parties and that the order for taxation must, therefore, be confined to the bill incurred by the petitioner solely, and as to which no action was pending.

(a) 1 Russ. 519. And see *re Rice*, 2 Keen, 181, [183, n. 2]

1839.—*Lippiat v. Holley*.

[*423] **JOHN LIPPIAT v. WALTER HOLLEY*, by *JOHN BUBB*,
his Guardian.

1839 ; February 12.

A proposed compromise of a suit appearing to be for the benefit of an infant defendant, the court sanctioned it, without a reference to the Master.

By a decree of the 23d of February, 1833, it was referred to the Master, to take an account of what was due to the defendant for principal and interest on an indenture of the 5th of January, 1797, and to take an account of all sums laid out by the defendant, or by those under whom he claimed, in obtaining a renewal of a lease and necessary repairs and lasting improvements on the premises, with interest ; and also to take an account of rents and profits received by the defendant and the several persons under whom he claimed, and the defendant was to be charged with an occupation rent.

The Master, by his report, dated the 2d of March, 1837, found the sum of 1254*l.* to be due from the plaintiff to the defendant, and the sum of 1427*l.* due from the defendant to the plaintiff, and on the whole, that 173*l.* was due from the defendant to the plaintiff.

The defendant took exceptions to the report, which were overruled without costs, and the deposit was ordered to be returned.

At the hearing a compromise was agreed upon ; but the registrar objected to draw up the order, on the ground that there ought previously to be a reference to the Master, to inquire whether the intended compromise would be beneficial to the infant.

[*424] **Mr. Kindersley* and *Mr. Bethell* now applied that the order might be drawn up without incurring the expense of a reference. They urged that all the facts being now before the court in the same way as if the matter were before the Master, and the court having the means of seeing that the arrangement was manifestly for the infant's benefit, it was unnecessary to send the matter before the Master.

THE MASTER OF THE ROLLS said he was disposed to make the order without a reference, as it clearly appeared for the benefit of the infant. The decree should contain a recital to that effect.[1]

"Declare that it is for the benefit of the defendant that such order should be made as follows, the plaintiff, by his counsel, consenting thereto. And the court doth therefore order, that the defendant do assign the lease of the premises in the pleadings in this cause mentioned to the plaintiff : and do deliver up to the plaintiff all deeds, papers and writings relating to the premises, in his custody or power ; and it is ordered that the defendant do attorn tenant to the plaintiff of the mill and premises, with the machinery, &c. ;

[1] For analogous cases, in which an order has been made, without reference to a Master, see *Ex parte Farrow*, 1 Russ. & M. 112, and n. 2, *ibid.* See further *Parker v. Burney*, post 492.

 1838.—*Keys v Keys*.

and do execute to the plaintiff a release of the mortgage debt and of the claim in respect thereof; and it is ordered that the plaintiff do execute to the defendant a release of all claims for or in respect of the rents, or otherwise in relation to the matters in question in this suit; and it is ordered that the defendant be at liberty to keep the said premises, as tenant to the plaintiff, at a pepper corn rent, until Lady-day now next; and it is ordered that the defendant do then deliver up possession of the said premises and all the fixtures, &c.; and it is ordered that all further proceedings in this cause be *stayed, but with liberty to any of the parties to apply to this court, [*425] touching the performance of the direction hereby given, as they may be advised." Reg. Lib. B., 1839, p. 358.

KEYS v. KEYS.

1839: November 10, December 19. 1839: April 16.

A receiver had been appointed of the testator's estate, part of which was in India, and it having become necessary to have it remitted, Held, that the proper course was to refer it to the Master, to inquire what would be the most advantageous course for receiving, and remitting it to England.

PART of the testator's estate consisted of 50,000 sicca rupees, invested by him in the Bengal 6 per cent. remittable loan of 1822-23.

A receiver of the testator's estate had been appointed, and interest on the loan having ceased, the receiver presented a petition to the court, for liberty to execute a power of attorney to Messrs. Forbes & Co., or some other person authorizing them to receive the funds in India, and transmit them to this country.

Mr. *J. Moore*, for the petition.

THE MASTER OF THE ROLLS said that the practice in such cases had been settled in a case of *Wood v. Wood*; and that an inquiry must be made, as to what was the usual course in such cases.

On the 19th of December, 1838, it was referred to the Master, to inquire and state to the court, what could be the most advantageous course of receiving and remitting to England the sum of 50,000 sicca rupees; and for realizing, collecting and remitting to England any other part of the testator's personal estate which might be in India; and to approve of a scheme for that purpose.

*By his report, dated the 25th of March, the Master approved of a [*426] power of attorney being sent out to Messrs. Forbes & Co. to receive the sicca rupees and any other part of the testator's personal estate in India; and by an order made the 16th of April, the Master's report was confirmed;

1839.—Low v. Carter.

and it was ordered that the petitioner should be at liberty to send out a power of attorney to Messrs. Forbes & Co. to receive the note of 50,000 sicca rupees and the proceeds thereof and any other moneys or estates belonging to the estate of the testator, and to remit the same to the petitioner; and it was ordered that the petitioner should be at liberty to authorize Messrs. Forbes to do all proper and necessary acts for that purpose.

LOW v. CARTER.

1839: March 13.

The only way in which executors can obtain complete exoneration is by passing their accounts in a court of equity, and the court is, consequently, anxious not to deter them from so doing, by visiting them with the costs.

A husband transferred money in the funds into the joint names of himself and wife, for the purpose of making a provision for her; and by his will he bequeathed to his wife a life interest in "all his property that he was in possession of:" Held, that the stock did not pass.

A testator directed his widow "to be in possession of all his furniture, plate, glass and books, and for the time of her natural life, to receive the yearly interest and profits of all his property that he was in possession of at his death:" Held, that the widow took a life interest only in the furniture, &c.

THE testator, John Carter, by his will, dated the 13th of February, 1834, after desiring his executors to pay his funeral and testamentary expenses, proceeded in these words:—"If my wife Elizabeth Carter outlives me, then the said Elizabeth Carter to be in possession of all my furniture, plate, glass and books, and for the time of her natural life, to receive the yearly [427] interest and profits of all my property that I am in possession of at my death; and if the 300*l.* which is now in the hands of Messrs. David and Joseph Hyland, of Burwash, in Sussex, when I die, I request it to be taken from their hand, and put into the best stock in the Bank of England, but in no sinking fund; to be put in Elizabeth Carter's name, and she to receive the interest during her natural life. And if my wife outlives me, I request my executors will see that she be decently buried, and all expenses paid; then after that, the whole of what remains to be equally divided in four parts." He then gave one-fourth to Thomas Low and Sarah his wife, and the remaining three-fourths to other persons: and he appointed Thomas Low and James Hensley executors. The testator died on the 29th of August, 1834, and his two executors proved his will.

At the time of the death of the testator, there stood, in the joint names of himself and his wife, a sum of 315*l.* new 3*l.* 10*s.* per cent. reduced bank annuities, which sum the testator, in the month of January, 1834, had directed his stock broker to purchase in the joint names of himself and wife, for the purpose, as he stated to his stock broker, of making a provision for his wife.

There was parol evidence of the testator having, in a conversation which

1839.—*Low v. Carter.*

took place the day before his death, said "that the said property in the Bank of England being in their joint names, he considered it belonged to his wife solely at his decease, and, therefore, he had no occasion to leave it to her by will."

The only other property of the testator was the 300*l.* due from Messrs. Hyland, the furniture, &c., valued at 19*l.* 17*s.*, and about 20*l.*

"This bill was filed by Thomas Low and Sarah his wife and James [*428] Hensley, against Sarah Carter the widow and the other persons interested. The bill claimed the 315*l.* bank annuities as part of the testator's estate, and also insisted that the widow was entitled to the furniture for life only, and prayed the usual accounts.

Mr. *Kindersley*, and Mr. *Hull*, for the plaintiff, contended, that the widow took a life interest only in the furniture; that the stock passed under the will, as being in the testator's "possession" at his death, and, consequently, that the widow was entitled thereto for life only.

Mr. *Pemberton* and Mr. *L. Wigram*, for defendants in the same interest with the plaintiff, contended, that even if the testator had transferred the funds into the joint names of himself and wife for the purpose of making a provision for her, yet the extent of the interest she was to take being undefined, the testator must have intended her to take a life interest only.

Mr. *Tinney* and Mr. *Schomberg*, contra, for the widow, contended, that she was entitled to the furniture absolutely, and that the testator had no power to bequeath the 315*l.* stock, which survived to his widow: *Dummer v. Pitcher*.(a) That the executors having taken upon themselves the duty of administering the estate, were not justified in coming to the court, where no difficulty really existed, and in incurring expenses which would exhaust the whole of this little property.

That the bill had been filed by executors, nominally for the administration of this very small estate, "but in reality for purposes of vexa- [*429] tion and to impeach the title of the defendant to the 315*l.* stock, to which she was entitled independently of the will, and that the bill ought therefore to be dismissed with costs.

Mr. *Kindersley*, in reply. The only way in which an executor can be protected is to have his accounts passed in this court: the smallness of the estate is not the fault of and does not alter the liability of the executor: the court cannot refuse to allow an executor to pass his accounts, in the only way which will secure him from future peril.

THE MASTER OF THE ROLLS :—There are two questions in this case: first, whether the will passed certain stocks which were standing in the joint names of the testator and his wife at his decease; and, secondly, what interest the wife took in the furniture and other things under the will of her husband.

In January, 1834, the testator caused certain stocks to be invested in the

(a) 2 Myl. & K. 262.

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joint names of himself and his wife : this stock was not then in his own possession, though it might be said to be in the possession of himself and wife and was so circumstanced, that he might have transferred it into his own name, and thus have dealt with it as he pleased.

In February, 1834, the testator made his will in which he says, "If my wife Elizabeth Carter outlives me, then the said Elizabeth Carter to be in possession of all my furniture, plate, glass and books, and for the term of her natural life, to receive the yearly interest and profits of all my property that I am in possession of at my death : " and the question is, whether this [*430] stock, which *was standing in the joint names, passed by the description of "all my property that I am in possession of at my death," and I think it did not : the property was transferred into the joint names, for the benefit of the survivor, and although it was stock which the testator could in his lifetime have transferred into his own name alone, yet it was not strictly "in his possession at his death." The will operated only upon the death of the testator, and at that moment the right of the survivor took effect, and there was then no authority or power to defeat it.

As to the other point, I think that the testator meant that his wife should take a life interest only, in the furniture, plate, glass and books ; and that at her death, the whole, after payment of the expenses of her funeral, were to be divided between the persons pointed out ; she was to have the "possession" of these specific articles, and it appears from the will that the testator intended that she should not take more than a life interest in them.

As to the costs of the suit, I cannot conceive that any thing could be more hard, than that executors who are called on to administer estates where there are doubtful questions arising on the will, and who can be exonerated only by having their accounts passed in a court of equity, should be deterred from coming to this court, by being visited with the costs of the proceeding.

Looking at the circumstances of this case, and at the decisions of this court, which show that executors can only obtain complete exoneration by having their accounts passed in this court, (a) can I say that the executors [*431] are *not justified in seeking the opinion of the court in this case, although it has turned out, that on the principal point, there has been a decision in favor of Mrs. Carter ?

It is to be regretted that the jurisdiction of the court in such cases, cannot be exercised at a less expense ; but when we so frequently see suits instituted against executors, after a considerable lapse of time, and find them held personally responsible for acts done by them in mistake, but with the most honest intention, the necessity of giving them every opportunity of exonerating themselves, by passing their accounts in this court, is obvious.[1]

(a) *Knatchbull v. Fearhead*, 3 Myl. & Cr. 122.

[1] Vide *Hill v. Gumme*, post 540, 550.

1839.—Hodge v. Lewin.

HODGE v. LEWIN.

1839 ; June 17.

The dividends of a sum in court being insufficient for the payment of an annuity charged upon it, a prospective order was made, for the sale, from time to time, of so much of the corpus as would, together with the dividends, be necessary for raising the amount of the annuity.

By an order of the court, dated the 5th of November, 1830, it was declared that the income of the produce of the real and personal estate of the testator, together with the accumulations arising therefrom, were subject to the payment of the defendant's, Eleanor Routh's, jointure or rent charge of 300*l.* a year for her life, so far as the same would extend to pay ; and it was declared, that the defendant was entitled to have any deficiency in the income to answer the arrears and keep down the future payments of the said jointure or rent charge raised, from time to time, by the sale of the capital *produce of the real and personal estate of the testator, as occasion [*432] might require.

The fund in court charged with this sum of 300*l.* a year amounted to 4882*l.* consols, and in consequence of the dividends being inadequate to keep down the accruing payments of the rent charge, it had fallen into arrear to the amount of 325*l.*

The committee of Eleanor Routh, who was a lunatic, presented a petition praying a sale of sufficient part of the 4882*l.* to raise the arrears, and for a sale, half yearly, of so much of the capital sum as would be sufficient with the accruing dividends, to answer the annuity of 300*l.* a year, and for payment thereof accordingly.

Mr. Tinney, in support of the petition.

THE MASTER OF THE ROLLS, on a former day, doubted whether a prospective order could be made for raising the deficiency out of the corpus of the fund, but he now made the order on the authority of, a case of *Swallow v. Swallow*.(a)

(a) SWALLOW v. SWALLOW.

V. C.—1831 : March 28.

A sum of money, in the 5 per cents, set apart to answer an annuity, was reduced to 3½ per cents, and the dividends having become insufficient to pay the annuity, the court made a prospective order for the sale, from time to time, of a sufficient part of the capital to meet the accruing payments of the annuity.

THE order in this case stated the petition of Elizabeth Prince Swallow, setting forth that John Stuart by his will bequeathed to the petitioner 400*l.* a year, payable half yearly, during her life, and charged upon the whole of his personal estate ; and that he gave his residuary estate to Henry Stuart and his issue ; and further setting forth, that by a codicil the testator gave the petitioner an annuity of 100*l.* a year to be paid out of the property of John Townsend, to which the testator was entitled ; that in December, 1803, it was ordered that the dividends on the sum of 3333*l.* 6*s.* 8*d.*, which had been transferred into the name of the accountant general, should be paid to the petitioner for life, to answer the annuity of 100*l.* a year ; and in March, 1805, it was ordered that 8000*l.* navy 5 per cents should be carried over and placed to the petitioner's annuity account, and the dividends should be paid to the petitioner for life, to answer the growing payments of the annuity of 400*l.* ; that the annuities were carried over and were converted into 7834*l.* 19*s.* 10*d.*

 1838.—*Silvertop v. Ramsay.*

The order after directing payment of the arrears, proceeded, "And [*433] on or after the 6th day of January next, *and on or after every succeeding 6th day of July, and the 6th day of January, during the life of the defendant, Eleanor Routh, or until the further order of this court, it is ordered that so much of the residue of the said bank 3l. per cent. annuities or any other bank annuities, which may be standing in the name of the said accountant general in trust in this cause, as will be sufficient to [*434] *raise such part of the sum of 150l. as and for one half yearly or two quarterly payments of the jointure or annuity of 300l. a year in the petition mentioned, as the interests which shall have accrued due at the time of such sale on the residue of the said bank annuities, or on such other bank annuities as aforesaid, shall be insufficient to pay (the amount of such deficiency to be from time to time verified by affidavit) be sold."

SILVERTOP v. RAMSAY.

1838 ; November 13.

In a suit for the administration of the estate of a testator, a solicitor carried in a claim for his bills of costs, which, on taxation, were reduced by more than one-sixth : Held, that the solicitor ought to pay the costs of the taxation.

In July, 1830, it was referred to the Master to take an account of the debts, funeral expenses and legacies of the testator ; and the Master having made his report, the cause was heard, on further directions, in July, 1831. In May, 1832, on the petition of Mr. G. D., who had formerly been a solicitor, it was referred to the Master to inquire and state to the court whether the testator was, at the time of his death, indebted to G. D. in any and what sum.

G. D. carried in a claim before the Master for his bills of costs, amounting to 2871l. ; on taxation they were reduced to 2141l., and which sum, after deducting 373l. already paid, the Master reported due to G. D.

3½ per cents, which produced an income of 275l. only, and the annuity of 400l. had fallen into arrear to the extent of 62l. : whereupon it was ordered that the costs of this application should be taxed, and that a part of the 7834l. 19s. 10d. 3½ per cents should be sold for payment thereof, and of the 62l. And it was ordered, "that so much of the residue of the said 7834l. 19s. 10d. new 3½ per cent. bank annuities, or of any other new 3½ per cent. bank annuities which might thereafter be standing in the name of the said accountant general in trust in the said first mentioned cause, to the last mentioned account, as would be sufficient to raise such part of the half yearly payment of the petitioner's annuity of 400l. in the petition mentioned, as the interest to accrue half yearly on the said new 3½ per cent. annuities, should be insufficient to pay, (such deficiency to be from time to time verified by affidavit,) be from time to time sold during the life of the petitioner, or until the further order of the court, with the privity of the said accountant general, &c. And it was ordered that the same, when so paid into the Bank, together with the interest to accrue due on the said annuities from time to time, be thereout paid to the petitioner Elizabeth Prince Swallow.

(a) See *Davies v. Wattier*, 1 S. & Stu. 463 ; *Kendall v. Russell*, 3 Sim. 424 ; *May v. Bennett*, Russ. 370 ; *Arundell v. Arundell*, 1 Myl. & K. 315.

1839.—Jacob v. Lucas.

G. D. now presented a petition, praying for the confirmation of the report, and for an order for payment of the 1768*l.* and the question raised was, as to the costs of the taxation.

*Mr. *Pemberton* and Mr. *Jemmett*, submitted that there was [*435] nothing to take this out of the usual rule, which threw the costs of taxation on the solicitor when one-sixth part of the bill was taken of by taxation.

Mr. *Kindersley*, contra, argued that the rule was laid down, by the statute(a) alone, and applied to those cases only, where the taxation took place under the statute, and not to a case like this, where a party came in to establish a legal demand in a suit, in which case there was no distinction whatever between a solicitor and any other persons having a demand against the assets.

THE MASTER OF THE ROLLS :—This gentleman asked the assistance of this court to establish his legal demand for his bill of costs, and for that purpose it was necessary for him to resort to a taxation, which has reduced his demand more than one-sixth. In such cases, the statute provides that the solicitor shall pay the costs, and it seems to me that this also is a very proper case in which he should pay the expenses.[1]

*Between MARY JACOB AND ROBERT ROTHWELL LUCAS AND [*436] OTHERS, INFANTS, BY THE SAID MARY JACOB, THEIR NEXT FRIEND, PLAINTIFFS; and ROBERT TRISTRAM LUCAS AND OTHERS, DEFENDANTS.

1839; May 6.

M. J., the personal representative of a deceased trustee, together with infants, beneficially interested in a fund, by M. J. their next friend, were co-plaintiffs in a suit, the object of which was to make the tenant for life and his interest in the trust funds answerable for part of the trust funds which the tenant for life had applied to his own use; there were other parties interested in the restitution of the fund, who were made defendants. The court, being of opinion that the trustee's assets might, in the progress of the suit, have to be resorted to for the purpose of making good the breach of trust, and that the interests of the infants and of M. J. would thereby ultimately become conflicting, dismissed the bill with costs, on the ground of the misjoinder of plaintiffs, but without prejudice to any new bill.

STUCKLEY LUCAS, by his will, directed his children to assign to the trustees of his will certain stocks, funds and securities, to which they would be-

(a) 2 G. 2, c. 23.

[1] In *Barton v. Pyne*, 1 Hare, 493, Wigram, V. C. repudiates the idea that the jurisdiction over solicitor's bills, was derived from statute. The marginal note in that case is; "In a suit against a solicitor for an account in the taking of which the bills of costs of the defendant are taxed, and reduced more than one-sixth in amount, the court has jurisdiction to give or withhold the costs of taxation, according to the circumstances and justice of the case." The V. C. says;

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come entitled under the testator's marriage settlement; and in default, that they should forfeit the benefits given them by his will. The testator gave part of his property, including the property in the settlement, to his trustees, Thomas Todd, John Henry Jacob, Richard Bere and John Beague, in trust as to part, for his son Robert Tristram Lucas, for life, with remainder to his children, and as to other part, for the benefit of persons defendants to the suit; and he appointed the four trustees his executors. The will contained a direction, that when any trustee should die or refuse to act, the surviving or acting trustees should appoint new trustees, "so that there might not be less than two acting trustees at any one time."

The testator died in 1811, and Thomas Todd and John Henry Jacob alone proved his will. Part of the testator's property consisted of 825*l.* bank stock and 17*l.* 10*s.* long annuities, standing in his name at the time of his death. The acting executors and trustees did not transfer these sums into their own names, but suffered them to remain in the name of the testator.

The settlement funds were assigned by the testator's children to the trustees of the will, but were permitted by them to remain standing in the names of the trustees of the settlement.

Thomas Todd died in 1819; and John Henry Jacob, who survived him, appointed no new trustee in his place. He died in 1828, having appointed the plaintiff, Mary Jacob, his sole executrix, who afterwards proved his will. After the death of John Henry Jacob, Robert Tristram Lucas, upon the renunciation of Bere and Beague, the two other executors who had not acted, obtained letters of administration, *de bonis non*, of the estate and effects of Stuckley Lucas; and, as administrator, he sold out the two sums of 825*l.* bank stock and 17*l.* 10*s.* long annuities, and he applied the same to his own use. This he was enabled to do, in consequence of the acting executors, Thomas Todd and John Henry Jacob, having allowed these sums to remain in the name of the testator, Stuckley Lucas.

Robert Tristram Lucas assigned his interest under the will to secure 150*l.*

"The court by analogy to the rule which the statute lays down, throws upon the solicitor the costs of the taxation, where his bill is reduced by more than one-sixth of the amount. The same rule is adopted, and is commonly pursued in bankruptcy, &c. That does not owe its jurisdiction on this subject to the statute, but acts under the general authority which it possesses. In the case of *Bignot v. Bignot*, (11 Ves. 328,) an order was obtained in the cause for the taxation of the solicitor's bill: and an application was made to discharge the order, on the ground that the court had not jurisdiction to make it in the cause, and that the motion should have been *ex parte*; but Lord Eldon said, that the jurisdiction here and at law was much more ancient than the statute; the court subsequently applying the process independent of the statute, but "generally pursuing the equity with regard to costs which is stated in the statute."—In *Silvertop v. Ramsay*, Lord Langdale, applied the same rule; but it does not appear whether in doing so he relied upon the statute. I have no doubt of the jurisdiction of the court to deal with the taxing of the bill of the solicitors, who are the defendants in this cause, although that jurisdiction is not founded upon the statute." The decision quoted in this note is important in reference to the jurisdiction exercised by the court over its officers.

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to John Wood; and, in 1822, he likewise charged it with an annuity of 32*l.* to George Haynes, and, in 1834, he further charged it with an annuity of 106*l.* 12*s.* to Mr. Rudall.

A suit of *O'Neill v. Lucas* had been instituted, to compel the specific legatees of Stuckley Lucas to contribute towards payment of his debts, there being a deficiency of assets to provide for the debts and legacies.

*In that suit, funds, in which Robert Tristram Lucas was interested [*438] under the will, had been paid into court. The effect of that suit was relied on in argument, but did not form the ground of the decision.

This bill was filed by Mary Jacob, the executrix of John Henry Jacob, who was the surviving acting executor and trustee under the will of Stuckley Lucas, and by the infant children of Robert Tristram Lucas, (who were entitled in remainder to part of the property,) by Mary Jacob, their next friend, against Robert Tristram Lucas, his incumbrancers, and against the personal representatives of Thomas Todd the other executor and trustee, and against the other parties interested, praying, "That Robert Tristram Lucas might be decreed responsible for the said several sums of 825*l.* Bank of England stock and 17*l.* 10*s.* long annuities, which he had sold out and applied to his own use;" and that he might be decreed to replace those sums; and "in default thereof, that the several stocks, funds and securities, to which he might be held to be beneficially entitled under the said will, and in the said suit of *O'Neill v. Lucas*, might be appropriated and applied in the liquidation and satisfaction of such several sums of stock and annuities.

The bill charged, "That Robert Tristram Lucas pretended that he was not liable to reinvest the said stock, or to supply any deficiency that might arise in respect thereof, but that the estates of Thomas Todd and John Henry Jacob, or one of them, were liable in respect of any loss incurred thereby; for that such several sums of stock ought, upon the death of the said testator, Stuckley Lucas, to have been invested in their names, and that they wilfully neglected to do so, and that in consequence thereof, they were guilty of a "breach of trust, and ought to make good any loss occasioned [*439] thereby; whereas the plaintiff Mary Jacob, expressly charged, that the said trustees and executors were never directed by the said will to invest any such stock in their own names by said testator, and that independently of that circumstance, the same remaining outstanding was a protection to the interest of the *cestui que trust*, by remaining distinct and unmixed with other funds, over which they had control, and to which other parties were entitled."

Mr. Tinney and Mr. Benson, for the plaintiffs.

Mr. Pemberton and Mr. Rudall, for an incumbrancer on the interest of Robert Tristram Lucas.

Mr. Stuart and Mr. Lutwidge, for Mr. and Mrs. Chafy.

Mr. Glasse, for the trustee of the settlement.

Mr. C. P. Cooper, Mr. Stinton and Mr. Piggott, for other parties.

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The first point argued was this: Robert Tristram Lucas having committed a breach of trust, it was admitted that his interests under the will were liable to make it good, but then a question arose between the other legatees interested in the fund and the incumbrancers of Robert Tristram Lucas, as to their priorities; *Woodyatt v. Gresley*; (a) *Ex parte King*. (b)

Next it was objected, by some of the defendants, first, that this suit [*440] was unnecessary, as its objects might have been obtained in the suit of *O'Neill v. Lucas*; and secondly, that the plaintiff Mrs. Jacob and the infants had conflicting interests; and John Henry Jacob had committed a breach of trust by allowing the fund to remain in the name of the testator, and by not appointing new trustees, by which means Robert Tristram Lucas, the administrator *de bonis non*, obtained possession of the fund; that consequently his estate, which was represented in this suit by the plaintiff Mrs. Jacob, was liable to the infant plaintiffs and to the defendants for this breach of trust; and that it was impossible that the rights of the parties could be properly worked out in a suit constituted like the present; that there was a misjoinder of plaintiffs, and that therefore no relief could be given in this suit. It was also argued, that on the death of Mrs. Jacob's husband, the trust devolved on her, and that she ought then to have taken measures for the protection of the fund; that her object in this suit was to exonerate herself and her testator's estate from the consequences of the breaches of trust for which they were liable, and that her joining the infants as plaintiffs in the suit was for the purpose of obtaining, through them, relief, to which, if suing alone, she would clearly not be entitled.

THE MASTER OF THE ROLLS:—The bill prays [his Lordship stated the prayer.] It appears that Robert Tristram Lucas, as legal personal representative of the testator Stuckley Lucas, procured these funds, in which he was entitled to a life interest, with remainder to the plaintiffs, his infant children, to be transferred into his own name, and that he has applied them to his own use: nothing can be more clear than the equity of the plaintiffs to relief in respect to this gross breach of trust: and if this were all, it would be equally

clear that the plaintiffs and those who have suffered from this breach [*441] of trust, are entitled to be recouped to the extent of the interest of

Robert Tristram Lucas; he has not only committed these breaches of trust, but he has assigned his beneficial interest to other persons; and when the plaintiffs ask that his interest may be appropriated and applied in satisfaction of the breaches of trust, they come in instant competition with the other persons who have claims on the fund, either in the character of assignees or in the character of persons who, having suffered from these breaches of trust, are, as such, entitled to equal relief with the plaintiffs. It is necessary, therefore, to look beyond the simple circumstances to which I have adverted.

(a) 8 Sim. 180.

(b) 2 Mont. & Ayr. 410.

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The testator died in 1811 : by his will he appointed four persons to be his trustees and executors, two only proved ; and it appears that his assets consisted of stocks, funds and securities standing in his name : he made gifts to his children on condition that they assigned to the trustees of his will certain settlement funds to which they were entitled : the children, it is said, assigned their interests and accepted the benefit under the will. Todd, one of the executors, died in December 1819 ; the other acting executor was Jacob, who died on the 13th of January, 1828. At that time a portion of the funds remained in the name of the testator ; while that portion of the settlement fund, which he had purchased by gifts to his children, remained in the names of the trustees of the settlement. The acting executors and trustees did not declare the trusts specifically or convert themselves from executors to trustees, of the funds which were standing in the name of the testator, and did not procure the transfer of the settlement funds. Jacob, the survivor having died in January, 1828, the two other persons who had been appointed executors and trustees renounced ; and letters of administration, with the will annexed, were granted to Robert Tristram Lucas, who [*442] thereby took on himself the execution of the trusts of the will.[1]

At the time he procured the letters of administration to be granted to him, the funds were in this situation : partly in the name of the testator and partly in the name of the trustees of the settlement ; and in this state of things the case of *O'Neill v. Lucas* was instituted. [His Lordship stated the nature of the suit of *O'Neill v. Lucas*.] There seems great difficulty in this suit not being connected with *O'Neill v. Lucas*, so as to enable the plaintiffs to avail themselves of the proceedings in that case. A bill, being necessary, is filed, not on behalf of the infants alone, but in conjunction with Mary Jacob, who is the legal personal representative of John Henry Jacob the surviving executor and trustee, who, it appears, has been sought to be charged with a breach of trust. Mary Jacob, it is to be observed, is not at all personally responsible, (except out of the assets of John Henry Jacob,) for this breach of trust, which was of this nature ; a certain number of trustees ought to have been kept up, which has not been done, and the funds were left in the name of the testator, and were never transferred into the names of the trustees ; by these means Robert Tristram Lucas got possession of these funds, and was thereby enabled to commit this breach of trust. Another breach of trust complained of was this, that after Todd and Jacob had (the time of the assignment is not stated,) obtained an assignment and transfer of the settlement funds, by which they became a portion of the testator's estate, they were permitted to remain in the names of the trustees of the settlement ; the income was paid to the persons entitled, without any notice having been given to the trustees that the trust fund had become the property of the testator ; and subject to the

[1] Where personal property is bequeathed to executors as trustees, the probate of the will is an acceptance of the trust. 3 Myl. & Cr. 710, n. 1, and cases there cited.

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trusts of his will; Robert T. Lucas was permitted to receive, the [443] interest of the trust funds *thus remaining in the hands of the trustees and he proceeded to deal with it for the purpose of making incumbrances and granting annuities payable out of his interest. In this state of things, it is not to be wondered that those persons who are interested in the estate of the testator, and have suffered by the breaches of trust of Robert Tristram Lucas, should say that there is a remedy against the trustees in respect of those breaches of trust; and it is clear that if John Henry Jacob was answerable for them, his estate in the hands of Mary Jacob is also answerable. Now what is sought in this suit is, that the infant children of Mr. Lucas desire to be repaid out of his life estate; but in seeking payment out of that life interest, they come in competition with a great variety of other persons,—with persons standing precisely in the same situation,—having precisely the same rights and equities as they have, and with other persons who, under the circumstances I have mentioned, have become assignees of the interest of Robert Tristram Lucas. Suppose (which may possibly happen) that the life estate of Robert Tristram Lucas should turn out to be insufficient to pay all the several losses which the parties have sustained by the breaches of trust, who would then be the persons next resorted to but those who have improperly permitted those breaches of trust to be committed? and these are the representatives of Todd and Jacob. I do not mean to decide any points of equity arising between the parties; but here I find the infant plaintiffs connected in the suit with a person with whom they may probably come into competition in the future stages of this cause. The answer which was made during the argument of this case was, that the joinder of Mrs. Jacob did not prejudice the infants at all, because any other person might file a bill and make Mary Jacob a defendant, and that [444] she would not in any way be released by this suit. But is *that a state in which things ought to be left? I confess I feel it impossible to get over the difficulty; thinking, at the same time, there is a right on the part of the plaintiffs to equitable relief, if it were correctly brought forward, I should be disposed, if I could set every body right as to costs, and if I could leave the question open as to the responsibility of Mary Jacob, to put the suit right, rather than dismiss the bill. I have no objection to let the cause stand over for a few days, to see if the parties can arrange it.

It being intimated to the court, that there was no prospect of the parties consenting to any arrangement,

THE MASTER OF THE ROLLS said, then I must dismiss the bill with costs, without prejudice to the plaintiffs filing another bill, or adopting such proceedings as they may be advised, and without prejudice to any question as to the rights of the parties.[1]

[1] As to the general rule that parties having adverse interests should not be made co-plaintiffs, see *Grant v. Van Schoonhoven*, 9 Paige, 257; *Cholmondeley v. Clinton*, Turn. & Russ. 116, *Hutchinson v. Reed*, 1 Hoff. Ch. Rep. 128.

1839.—Holden v. Hearn.

*HOLDEN v. HEARN.

[*445]

1839 ; April 24.

In a suit by the assignee under the insolvent debtor's act, to recover some property for the benefit of the estate, a creditor of the insolvent is not a competent witness on behalf of the plaintiff: and he is not rendered competent by the 3 & 4 W. 4, c. 42, ss. 26, 27.

In order to enable an infant defendant to enter into evidence in support of facts which would not otherwise be in issue in the cause, it is proper that they should be stated in his answer; but whatever admissions may be made or points tendered in issue in the answer of an infant, the plaintiff is not in any degree exonerated from proving as against the infant the whole case on which he relies.

Where the plaintiff failed in proving, at the hearing, a fact which was the very foundation of his title: Held, that it was not the proper subject for an inquiry before the Master: and the bill was dismissed with costs, with liberty to file a new bill.

THIS bill was filed by George Holden, the assignee, under the insolvent debtors' act, of William Baker, praying that it might be declared, that a deed of the 31st of August, 1830, in favor of William Baker, and Catherine Norris Baker, his daughter, and her children, was void as against the creditors of William Baker; and that Thomas Hearn, the trustee, might be ordered to surrender the copyhold property therein comprised, in order that it might be sold for the benefit of the creditors of William Baker.

The bill stated, that in August, 1830, William Baker was entitled to a sum of 600*l.*, which was then in the hands of Thomas Hearn; and that he was at that time considerably indebted, and had no means of paying his debts other than with the 600*l.*; and that with a view of withdrawing the same from the reach of his creditors, he resolved to invest it with another sum of 100*l.* in the purchase of three messuages.

It then stated, that he purchased from Richard Fitten three copyhold messuages, which, on the 31st of August, 1830, were surrendered to Thomas Hearn and George Nelson, upon the trusts of an indenture of even date, made between John Hicks of the first part, Richard *Fitten of [*446] the second part, William Baker of the third part, and Hearn and Nelson of the fourth part. This indenture after reciting a surrender, whereby John Hicks and Richard Fitten, and also William Baker did surrender the property in question, to the intent that the lord of the manor might regrant the same to Thomas Hearn and George Nelson, their heirs and assigns, upon the trusts after mentioned, declared the same to be for William Baker for life, or until he should commit an act of bankruptcy, or cause of forfeiture, or become insolvent, or under any legal disability; and from and after the decease of the said William Baker, or such bankruptcy, forfeiture, insolvency or disability as aforesaid, (which should first happen,) for Catherine Norris Baker for life, for her separate use; with remainder to her children; with remainder to William Baker in fee; and it was provided, that it should be lawful for the trustees, and they were thereby directed and empowered, in case the trust thereinbefore declared for William Baker should be determined by his bankruptcy, forfeiture, insolvency or disability as aforesaid, to pay or

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apply all such part, as they in their discretion should think proper, of the rents and profits of the said hereditaments and premises, in, for or towards his maintenance or benefit, from time to time during his life, in such manner as the said trustees, in their like discretion, should deem most expedient.

The bill then stated, that at the time of making the settlement, William Baker possessed no funds for the payment of his debts; that he then was and continued ever afterwards in insolvent circumstances; and that some time afterwards, namely, in the month of October, 1831, he executed an assignment of all his personal estate for the benefit of his creditors; but that such personal estate was of very small amount, and wholly [*447] *insufficient for the payment of his debts; and that such assignment was not acted upon.

It then stated that William Baker took the benefit of the insolvent debtors act, in July, 1833, and the plaintiff was his assignee; and that he was advised, that the limitation in the indenture of the 31st of August, 1830, in favor of Catharine Norris Baker in the event of William Baker becoming insolvent, was void as against the creditors of the said William Baker.

George Nelson had died, and this bill was filed against Thomas Hearn, the surviving trustee, and Catharina Norris Baker, the daughter, for the purposes above stated.

The defendant, Catharine Norris Baker, who was an infant, put in an answer, stating the will of her maternal grandfather, by which he gave a portion of his property to the defendant, Thomas Hearn, upon trust for the mother of the infant; that in July, 1829, Thomas Hearn drew up a statement of the personal estate and effects of her grandfather, from which it appeared, and the fact was, that there was due to William Baker, in right of his wife, the sum of 892*l.*; that it was agreed that 600*l.*, part of it, should remain in Hearn's hands, and be invested for the benefit of the defendant; and the residue was paid over to William Baker. The answer also stated, that the sum of 600*l.*, so remaining in the hands of Hearn, formed part of the purchase money or sum of 700*l.* in the bill alleged to have been invested by W. Baker, in the purchase of the three messuages.

The answer further stated that the infant's mother "departed this life several years ago," and that William Baker did not, in her lifetime, [*448] make any settlement or *provision for her and her issue; but that she did not in her lifetime waive her equity to a settlement; and the defendant submitted, that if the court should be of opinion, that the limitation in the settlement in her favor was void as against the creditors of William Baker, then that she was entitled to have a settlement or provision made for her out of the produce of the settled property.

The plaintiff, in support of his case, proved the settlement, and the assignment by William Baker for the benefit of his creditors, and his insolvency; and he attempted also to prove that William Baker was indebted at the time of the execution of the deed; but the witnesses as to the fact proved, on

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cross-examination, to be creditors or representatives of creditors of the insolvent. There was no proof of the 700*l.* being the money of the said William Baker, the settlor; but as to that fact, the plaintiff relied on the statement contained in the answer of the infant.

No evidence was produced on the part of the defendant.

The first question was, as to the admissibility of the evidence of the creditors of Wm. Baker to prove that he was indebted and embarrassed at the time of making the settlement.

For the plaintiff it was contended, that under the 3 & 4 W. 4, c. 42, ss. 26, 27, the evidence of interested witnesses might be received; that in the case of *Wheat v. Graham*,^(a) the Vice-Chancellor decided that the new rules of evidence, established by that act of parliament, ought to be adopted by courts of equity; and he directed the *entry which the [*449] act required, to be made in the decree. That the witnesses were not parties to the suit, and that the evidence of such of them as had executed the deed of composition and had released the debtor was admissible. [The Master of the Rolls:—The witnesses are in a strange situation, for when they gave evidence before the examiner they were under a bias, which it is now sought to remove by entering their names on the record.] The objection would be to their credibility, not to their competency.

For the defendant it was said, that the act in question applied only to witnesses incompetent on the ground that the verdict or judgment would be inadmissible for or against them, and did not apply to a case where the witness was directly interested in the verdict; *Davies v. Morgan*.^(b) That the circumstances under which the evidence of the witnesses in *Wheat v. Graham* had been received were not stated in the report, and that it was doubtful whether the sections of the statute in question were applicable at all to proceedings in equity; for that the Vice-Chancellor lately decided in a case of *Hall v. Ellis*,^(c) that the forty-second section of the statute of the 3 & 4 W. 4, c. 42, ^(d) was the only one which applied to courts of equity.

As to the creditors who had executed the composition deed, there was no evidence that their debts had been paid.

*THE MASTER OF THE ROLLS:—Supposing that the new rule of [*450] evidence established in courts of law ought to be adopted in like cases in this court, [1] ought it to be adopted in a case where the object of a suit is to establish a claim upon a fund for the benefit of the witness? I must reject the evidence of these witnesses, who, by their testimony, are seeking to recover a fund of which they are to partake. This is not like a case in which the party

^(a) 7 Sim. 61.

^(b) Ante, page 405.

^(c) 16th Feb. 1839.

^(d) In *Stewart v. Barnes*, 1 Moo. & Rob. 472, Baron Alderson, after conferring with the other Judges of the Court of Exchequer, held that a witness interested in the result of a suit in equity was not made competent by the statute, on the trial of an issue directed in such suit.

[1] Lord Lyndhurst has since held, (1842,) that the statute applies to courts of equity. *Oliver v. Latham*, 1 Phillips, 163.

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has an interest in the judgment which would be evidence in his favor: this is a case where the witnesses are absolutely interested in the subject of the suit. I am not sure whether I am acting in opposition to the case before the Vice-Chancellor, because the circumstances are not stated, so as to show the nature of the interest which the witness had in that case.

Mr. *Kindersley* and Mr. *James Booth* then contended, that the settlement was fraudulent and void both under the stat. 13 Eliz. c. 5, and the insolvent debtors' act of the 7 G. 4, c. 57; that there was sufficient on the face of the deed itself to show that the intention of the settlor was to withdraw his property from the claims of his creditors; and that in contemplation of an insolvency, he settled the estate so as to go over on that event, the trustees still retaining a discretionary power of allowing him the whole interest.

That it was evident that W. Baker must have been indebted and in insolvent circumstances, from the fact of his having, in 1831, executed an assignment for the benefit of his creditors, and by his having shortly after taken the benefit of the insolvent debtors' act.

[*451] *Lord Hardwicke, in *Stileman v. Ashdown*,^(a) says, "It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent, for if a man does it with a view to his being indebted at a future time, it is equally fraudulent and ought to be set aside." So, in *Lord Townshend v. Windham*,^(b) Lord Hardwicke observes, that if any mark of fraud, collusion or intention to deceive subsequent creditors appears, that will make a voluntary deed void.

That it was not necessary to prove that the party was insolvent at the time of making the deed, if it appeared that the intention was to delay creditors; *Richardson v. Smallwood*.^(c) They also cited *Hungerford v. Earl*,^(d) *Naylor v. Baldwin*.^(e)

Mr. *Pemberton* and Mr. *Milne*, contra, contended that no evidence had been produced by the plaintiff of the existence of any debt at the time of making the settlement; that there was no proof of any such sum as 600*l.* being laid out, or that it was ever paid, or that it belonged to the insolvent; that the defendant Hearn might have been examined on the part of the plaintiff, and he would have proved that this sum of 600*l.* was the money of the wife, and not of the husband; and that all that had been proved was, that this property was surrendered to three persons on certain trusts.

That an agreement by a father in favor of a child was considered as carrying with it a meritorious consideration, and would be enforced; [*452] *Elis v. Nimmo*.^(g) That *here the fund was in the hands of a third person, who would not part with it, except on the terms of

(a) 2 Atk. 481.

(b) 2 Ves., sen. 11.

(c) Jacob, 552. [558, n. 1.]

(d) 2 Vernon, 261.

(e) 1 Rep. in Ch. 130.

(g) Ll. & Goo. tem. Sugden, 333. [This decision has been seriously questioned, if not overruled—though the term *overruled* is objectionable as applied to the judgment of a distinct and independent

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making a settlement in favor of the wife and children ; and that therefore, the settlement made under such circumstances, was not voluntary ; that even a voluntary settlement of personal estate was valid as against subsequent, though fraudulent against existing creditors ; *Lush v. Wilkinson*,^(a) *Montagu v. Lord Sandwich*,^(b) *Kidney v. Coussmaker*,^(c) *Holloway v. Mil-lard*,^(d) *Higinbotham v. Holme*.^(e) That the settlement of the wife's estate on the husband until his insolvency or bankruptcy was perfectly valid ; *Ex parte Hodgson*.^(g) That no administration in the infant's answer could be read against her, and the very foundation of the claim of the plaintiff failing, the bill ought to be at once dismissed with costs.

Mr. Calvert, for Hearn.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS :—The plaintiff in this case is George Holden, the assignee of William Baker under the insolvent act ; the defendant, Thomas Hearn, is a trustee appointed under an indenture of the 31st of August, 1830, made partly for the benefit of the insolvent, and partly for the benefit of the defendant Catherine Norris Baker, his only child. The bill prays a declaration, that the limitation in that indenture in favor of the said Catherine Norris Baker and her children is void as against the creditors of William Baker, and prays consequential *relief. The [*453] case, on which this relief is sought, is this :—William Baker, the insolvent, being entitled to a sum of money in the hands of Hearn, and being insolvent and embarrassed in his circumstances, formed a scheme to withdraw this money from the claims of his creditors ; and in execution of it, he procured to be purchased a copyhold estate which is the subject of the settlement. If the case had been proved, there would have been a clear title to relief. The evidence produced in support of the case consists, first, of the indenture of August, 1830, by which, as I understand from the statements at the bar, it appears that Hicks, Fitton and William Baker the insolvent, are recited to have surrendered the copyhold estate into the hands of the lord of the manor of whom the copyhold was held in order that he might make a re-grant to Hearn and another person who is dead, who were to hold as trustees for the purposes which have been stated. The trusts were for Baker for life ; his life estate, however, being determinable upon his becoming bankrupt or insolvent ; with a limitation on his death or bankruptcy or insolvency, to the defendant for her life ; with remainder to her children : a proviso being added, that the trustees should have a discretion, after the bankruptcy or insolvency of Baker, to make an allowance to him out of the interest which would otherwise be vested in the infant defendant. This is

tribunal : the House of Lords alone can overrule the legal principles pronounced by the Chancellor of Ireland ; other courts may refuse to adopt them :—by Lord Cottenham in *Jefferys v. Jefferys*, Cr. & Ph. 151, and by Shadwell, V. C., *Holloway v. Headington*, 8 Sim. 225. And see 1 Story's Equity, § 372.]

(a) 5 Ves. 384.

(b) Id. 386, n.

(c) 12 Ves. 136.

(d) 1 Mad. 414.

(e) 19 Ves. 87

(g) 19 Ves. 207.

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the first evidence produced. The other evidence consists of an assignment made by Baker, dated the 8th of October, 1831, of his estate, exclusive of this property, for the benefit of his creditors; and by that deed it appears, that in October, 1831, he was very considerably indebted; and in the month of July, 1833, somewhat less than two years afterwards, being at that time, insolvent, he took the benefit of the insolvent debtors' act. He was [*454] embarrassed, to stay the least of it, on the 18th of October, *1831; but whether he was at all indebted to any person on the 31st of August, 1830, is not proved. The case which the plaintiff is to make out is, that this was a fraudulent conveyance, made to defeat the just demands of creditors. There is no proof that there were any creditors at the time; but then it might have been a settlement so fraudulently contrived as to be void against persons who afterwards became creditors; but it could only be fraudulent upon the supposition that the estate was his own. Now it is not proved that the estate was his, nor does it appear what was the nature of his power over it, nor what was the nature or extent of his interest in it, nor under what circumstances that indenture was executed. Nothing further appears than that which I have stated, that Baker and two other persons are said to have surrendered this estate into the hands of the lord of the manor, in order that he might re-grant to trustees, for the benefit of William Baker and Catherine Norris Baker and her children. It is said that it ought to be inferred that this was the estate of Baker, that he had the control over it, and that it was his without any obligation on his part to settle it in any particular manner. That is certainly not proved, but then it is said, that the plaintiff ought to be exempted from the necessity of proving it, in consequence of the statements and admissions in this answer. But the defendant against whom the relief is sought is an infant; if she had been so advised, she might have put in the common infant's answer, submitting her rights and interests to the protection of the court; in this case she has been advised, and not improperly advised, to do no more, because it enabled the plaintiff to see what was the case which was intended to be set up against him; and moreover, it enabled the defendant herself, if she had been advised so to do, to enter into evidence in support of those facts which formed her [*455] *case, and which would not otherwise have been in issue in this cause. The defendant, however, was advised not to go into any evidence; and the answer is attempted to be read on the part of the plaintiff, not, as it is said, as evidence against the infant, but it is read for the purpose of showing, that the issue tendered by the defendant, the infant, was such as to exempt the plaintiff from the necessity of proving his case. I confess that I cannot concur in that view: I think that the answer of an infant, stating facts which are intended to form the defence of the infant, extremely important both with regard to the infant and to the plaintiff; with regard to the infant, as enabling her to go into evidence as to matters which would not otherwise be in issue in the cause, and with regard to the plaintiff, as

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apprizing him of the points intended to be set up against him, and showing the case which he is to meet for the purpose of establishing that which he claims as relief for himself; but whatever admission there may be, or whatever points may be tendered in issue in the answer of the infant defendant, it appears to me, that the plaintiff is not in any degree exonerated from his duty in proving, as against the infant, the whole case upon which he relies.[1]

In this case, therefore, the plaintiff alleges that Baker fraudulently attempted to withdraw this property from the claims of his creditors, but has not proved, that the property which is alleged to have been withdrawn, was his property; and the case which is set up on the other side is, that it was not his property free from obligation. What is said on behalf of the infant is, that this property was purchased with a sum of money which was in the hands of Hearn, subject to an agreement or arrangement by which it was to be laid out in the purchase of land, to be settled for the benefit of the de- [*456] fendant. At what period of time that arrangement, if any, was made, does not at all appear; but it might have been an arrangement which was perfectly fair—it might have been an arrangement of which creditors had no reason whatever to complain, and there might have been some subsisting engagement with respect to it which prevented this settlement from being a fraudulent or voluntary settlement; we are therefore in a most unsatisfactory situation—we do not get at that, which is the real and substantial point in the case: the plaintiff not having proved that which happens unfortunately to be the very fact upon which the whole of his title rests. The provisions in the deed do certainly show very strong signs of an intention to withdraw the property in question from the claims of creditors, and if the only question had been whether there were creditors at the time when the deed was executed, I think there are circumstances here which would have induced me to have directed an inquiry upon that subject; but I do not think it proper, to make the very foundation of the plaintiff's title the subject of an inquiry upon a reference to be made at the hearing; and the title on which the plaintiff relies not having been satisfactorily proved, I think the proper course

[1] The answer of infants by their guardian is a pleading merely, and not an examination for the purpose of discovery: it is not evidence therefore, in their favor, although it is responsive to the bill and sworn to by their guardian *ad litem*. *Bulkley v. Van Wyck*, 5 Paige, 536. A plaintiff cannot, by any form of pleading compel an infant to become a witness against himself. *Ibid*. "A decree cannot safely be obtained against an infant upon the mere fact of taking the bill *pro confesso*, or on an answer in form by the guardian *ad litem*. The answer in such cases generally is, that the infant knows nothing of the matter, and therefore, neither admits nor denies the charges, but leaves the plaintiff to prove them, as he shall be advised, and throws himself on the protection of the court. A decree upon such an answer would not bind the infant, and he could open it, or set it aside, when he comes of age. No *laches* can be imputed to an infant, and no valid decree can be awarded against him, merely by default. The plaintiff in every such case, ought to prove his demand, either in court, or before a Master; and the infant is usually entitled to a day to show cause, when he comes of age." *Kent, Ch. Mills v. Dennis*, 3 Johns. Ch. Rep. 368.

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for me to adopt, is to dismiss this bill with costs, with liberty for the plaintiff to file a new bill if he thinks fit.[1]

Bill dismissed.

[*457]

*DIBBS v. GOREN.

1839; March 13.

Where a party who does not appear at the hearing is alleged but is not proved to be out of the jurisdiction, it is not the practice to direct an inquiry before the Master as to that fact; but the proper course is to obtain leave to exhibit an interrogatory to prove it.

It was proposed at the hearing to refer it to the Master to inquire whether it was the fact, as was alleged but not proved, that an absent party was out of the jurisdiction; but

[1] While the court sometimes, where a point has not fully been gone into before the hearing, and a case of suspicion or doubt arises, will direct a further inquiry, it cannot be done where the question has been distinctly put forth in the pleadings, an issue raised upon it, and testimony taken. *Morton v. Hudson*, 1 Hoff. Ch. Rep. 315. The plaintiff in a creditor's suit having taken the bill *pro confesso* against one of the defendants, who was the executor, adduced no evidence of his debt as against the other defendants, who were the devisees of the testator's real estate, and who did not admit the debt, except an examined copy of the judgment which the plaintiff had recovered for it, at law, against the executor Lord Cottenham, under the circumstances, refused leave to supply the defect in the evidence at the hearing, and dismissed the bill as against the devisees with costs, observing:—"The bill was taken *pro confesso* against Whichelo, the personal representative; and as against the devisees, there was no proof of the debt, the only evidence being an examined copy of the judgment against Whichelo. There could not therefore, be any decree against the devisees; but it was asked, that the plaintiff might have liberty to go into evidence to prove the debt, and the cause stood over that I might examine the cases upon that point.—It is impossible to reconcile the cases, or to extract any principle upon which any fixed rule can be founded. The court has exercised a wide discretion in giving or refusing leave to supply the defect of evidence, in doing which, the merits of the case upon the plaintiff's own showing ought to have a leading influence. I think, in this case, I should not exercise a sound discretion in giving to the plaintiff an opportunity of going into new evidence as to these devisees." *Marten v. Whichelo*, Cr. & Ph. 257. In *Hughes v. Eades*, 1 Hare, 486, which was also a creditor's suit, Wigram, V. C., said:—"The question is with regard to the suit so far as it seeks to affect the real estate. Now, the debt is admitted by the widow of the testator and the other devisees who are *sui juris*, but there is nothing which can be taken as proof against the married woman and the infant. The plaintiff's case is, therefore, defective; and the question is, whether I am simply to dismiss the bill as against those parties, or give the plaintiff the indulgence of proving his debt in this suit. I was referred to *Marten v. Whichelo*, as an authority that I ought to adopt the former alternative; but, in that case, there was no proof against any party that the debt was due; and Lord Cottenham said, his impression was, that where the plaintiff gave no evidence on the point upon which his whole case depended, he would not, at the hearing, be allowed to prove it; and, after reference to the authorities, he said, that the court had exercised a wide authority in giving or refusing leave to supply the defect of evidence in doing which, the merits of the case, upon the plaintiff's own showing, ought to have a leading influence. In some cases, the court has granted the indulgence; (*Seton on Decrees*, page 364. *Hord v. Pimm*, 4 Sim. 101. *Cox v. Allingham*, Jac. 337.) In the present case, I think I am justified in giving the plaintiff leave to perfect his case by proving the debt, inasmuch as that debt is admitted by all the parties who are before the court, and are *sui juris*."

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THE MASTER OF THE ROLLS said, that it was not the practice to make such a reference, but that the proper course was to obtain leave to exhibit an interrogatory to prove that fact.[1]

Mr. *Pemberton* and Mr. *Blunt* for the plaintiff; Mr. *Richards*, Mr. *Campbell*, Mr. *Heathfield*, Mr. *Keene*, Mr. *Chandless* and Mr. *Stuart* for other parties.

 IN RE THE RUGBY SCHOOL.

1839; January 12, 14, 15, May 4.

The court being of opinion that Lord Eldon on a previous occasion had considered that exhibitions belonging to a free school might be given to scholars not on the foundation, declined interfering so as to give the free scholars a priority over those who were not "foundationers."

The entrance of boys under twelve years of age into a free school having been discouraged, Held, on petition under the 52 G. 3, c. 101, that such a course of proceeding was prejudicial to the objects of the charity, and ought to be corrected.

The school was designated by the founder as a grammar school, but the boys were to be taught writing and arithmetic in all its branches: Held, that those who were qualified in other respects, ought to be admitted if they could read English and were capable of being taught the first elements of grammar.

THIS case came before the court upon the petition of W. F. Wratistlay and H. W. S. Gibb, two of the inhabitants of the town of Rugby in the county of Warwick, and was entitled "In the Matter of the Free School at Rugby, and of the act of the 52 G. 3, c. 101."(a)

"The petition prayed that it might be declared that several alterations made in the management of the school, and in the election to the exhibitions thereof, and in the class of inhabitants to whom the benefit of such school was confined, had been improperly made, and ought to be corrected; that the same might be corrected accordingly. That the first, second and third forms might be restored; that the exhibitions might in future be confined to the foundationers or free boys, or that no foreigner might be

(a) Sir S. Romilly's act.

[1] "The plaintiff alleges, that two of the parties are out of the jurisdiction; but there is no evidence of that fact, which ought to be proved in the regular manner. In some cases, the cause has been directed to stand over, suspending the whole decree, but giving leave to exhibit an interrogatory before the Examiner. In other cases, in order that the taking of an account might not be delayed, the account has been directed with leave to exhibit an interrogatory in the meantime. A third course has been to refer it to the Master, to inquire whether the fact is so or not, in cases where that mode of proceeding has not been objected to. But, as the plaintiff in this case must prove his debt, the obviously convenient course is to give him also, under the decree, the opportunity of proving that the parties are out of the jurisdiction. The plaintiff ought to have gone into evidence on this part of his case before he brought the cause to a hearing. In *Egginton v. Burton*, (January 29th, 1842,) I decided according to what I believe is the regular practice, and directed the cause to stand over, giving liberty to exhibit interrogatories to prove the fact that the absent parties were out of the jurisdiction." *Wigram, V. C., Hughes v. Eades*, 1 Hare, 486, 488. Another branch of this case has been cited in a previous note, ante, 456.

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elected when there was a free boy willing and fit; and that the benefits of the school might be extended to all the inhabitants of Rugby or within ten miles thereof, whatever duration their residence there might have been.

The charity was founded in 1567. On the 22d of July of that year, Lawrence Sheriff conveyed certain hereditaments to trustees, on trust, after his death to build a convenient school house and four lodgings to four poor men; and to cause an honest, discreet and learned man, being a master of arts, to be retained to teach a free grammar school, to serve chiefly for the children in Rugby aforesaid and of Brownsover, and next for such as should be of other places thereunto adjoining. And that for ever, an honest, discreet and learned man should be appointed to teach grammar freely in the same school, and the same man, if it might conveniently be, to be ever a master of arts; and he was to have the mansion house to dwell in without paying for it; and to have yearly for his salary 12*l*.

The same Lawrence Sheriff, by his will and codicil dated the 22d of July and 31st of August in the same year, gave other property to the same [*459] trustees for the same intent. He died in the year 1568, and the school *as well as certain almshouses which were part of the endowment, were established.

The regulations for the management of the school had been considerably affected by orders of this court and by several acts of parliament, (a) and the master was permitted to educate at the school, not only the boys who appeared to have been the first objects of the founder's bounty, but also other boys who came from distant places to be educated in the school at Rugby; and the boys educated at the school had not only the benefit of education there, but were permitted to receive exhibitions from the foundation in aid of their subsequent education at one of the universities.

The present master of the school, Dr. Arnold, was appointed to that situation about the year 1827, and complaints were now made, that of late years certain regulations, prejudicial to the interests of the objects of the founder's bounty, had been introduced. The complaints were, first, that exhibitioners were chosen from among strangers and free boys equally; Secondly, that children whose parents had not been resident within the limits for two years were excluded from the school; and thirdly, that young boys were discouraged from entering the school, and consequently that boys entitled to the benefit of the school, from a very early age were obliged to have a prior or preparatory education, to fit them for education in the school as now conducted.

It appeared that in the year 1803, the income of the charity being [*460] greater than sufficient to pay the expenses *of it as then conducted, by an order then made and by subsequent orders made in the year 1806, it was referred to the Master, to take into consideration such plan or

(a) The acts relating to this charity, are the 21 G. 2, c. 23, (private act); 17 G. 3, c. 71, (public act); 54 G. 3, c. 131, (private act); and 7 G. 4, c. 28, (private act.)

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scheme as the trustees should be advised to lay before him, for the future application of the surplus income of the charity, and for the disposition of all or any part of the past accumulations thereof, and of such further surplus income and accumulations as they should become possessed of, up to the time of such plan or scheme being finally approved by the court. A plan or scheme was accordingly laid before the Master, and in the consideration of it, he went minutely through the history of the charity up to that time; and it appearing, that the number of scholars taught in the school had been greatly increased since the time of passing the last previous act of parliament, the Master called for an account of the scholars and exhibitioners from the year 1780; and by such account, when produced, it appeared, that of the scholars taught at the school during the time over which the inquiry extended, one-fourth only, on an average, were foundationers, and that of sixty-three exhibitioners elected during the same time, twenty-one only were elected from scholars on the foundation, and forty-two from scholars not on the foundation. And the trustees having proposed to erect new buildings, and that when they should be completed, the trustees should be at liberty to elect and send seven more boys as exhibitioners in some of the colleges or halls at Oxford or Cambridge, to be elected and sent in like manner as the other exhibitioners were elected and sent: and upon the scheme which, amongst other things, contained this proposal, the Master approved thereof, except as to such parts thereof as related to the rebuilding the school master's house, and erecting new offices and studies thereto, and as related to the increase of the number of exhibitioners; and he did not approve of such parts of *the said plan; for, though he was of opinion that it [*461] was proper and necessary, that a sufficient dwelling-house with suitable offices should be erected and built for the residence of the master and the accommodation of the boys attending the school, and that it would also be proper that the number of exhibitioners should be increased, provided they were elected from the scholars belonging to the charity: yet, having regard to the size and extent of the buildings proposed for such dwelling-house and offices, and to the number and description of the masters and ushers employed at the said school, (amongst whom he found a French master and a drawing master,) and also to the circumstances, that of the number of boys who had been educated at the said school between the year 1780, and the year 1806 inclusive, not more than one-fourth upon an average belonged to the said charity, and that of the number of exhibitioners who had been chosen during the same period of time, one-third only had been taken from boys belonging to the said charity, it did appear to him, that such dwelling-house, new offices and studies proposed to be built as aforesaid, were calculated and designed for the receiving of boys of a different description, and of educating them in a different manner than what was meant or intended, either by the founder of the said charity, when he founded the same, or by the act of parliament thereinbefore mentioned to have been made and passed in the seventeenth

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year of his Majesty King George the Third; and to the prejudice of the boys who were properly entitled to the benefit of the said charity.

The Master having thus reported against the scheme proposed, the trustees presented their petition to the Lord Chancellor, praying that he would, nevertheless, permit them to carry their plan into execution, and the [*462] *Lord Chancellor accordingly gave them leave to do so: and it was ordered that the petitioners, the trustees, should be at liberty to elect and send seven more boys as exhibitioners, in like manner as the then present exhibitioners were elected and sent.(a)

With respect to the second complaint—that children whose parents had not been resident for two years within the limits were excluded—it was founded on a resolution of the trustees, dated the 6th day of July, 1830, and which was expressed as follows:—"It appearing to this meeting that the funds of the charity are likely to be encroached upon beyond the fair meaning of the act 17 G. 3, c. 71, and also to such an extent as may preclude the old residents from the full enjoyment of the benefits thereof by the great influx which has taken place, and is likely to continue, of strangers coming to reside in Rugby, for the more temporary purpose of availing themselves of the advantages of the foundation: ordered, that from and after Michaelmas next, the express sanction of the trustees be obtained, at their annual meeting, before any boy be admitted on the foundation whose parents or guardians shall not have been resident for the space of two years within the limits of the foundation."

The third subject of complaint rested on the evidence which it is not necessary to state.

The case was argued by

Mr. *Pemberton*, and Mr. *S. Precott White*, in support of the petition and by

[*463] Mr. *Kindersley*, and Mr. *Koe*, for the trustees of the charity.

The following cases were cited:—*Attorney General v. Hartley*,(b) *Attorney General v. The Dean and Canons of Christ Church*,(c) *Attorney General v. The Coopers' Company*,(d) *Attorney General v. The Earl of Clarendon*,(e) *Attorney General v. The Governors of the Atherstone Free School*;(g) and as to the jurisdiction of the court by petition under the 52 G. 3, c. 101, *The Corporation of Ludlow v. Greenhouse*,(h) and *Ex parte Berkhamstead Free School*.(i)

THE MASTER OF THE ROLLS:—I have read all the affidavits, but will read them again before I dispose of this case. It is quite obvious that the principle on which the court acts in such a case is this: the benefit of the objects of the foundation is most to be regarded. Though other persons may be allowed to receive very great benefits from a charity of this kind, yet it

(a) See 17 Ves. 505. (b) 2 Jac. & W. 353.

(d) 19 Ves. 186. (e) 17 Ves. 419, and see p. 505.

(h) 1 Bligh, N. S. 17, S. C. 1 Mad. 92.

(c) Jacob, 474, and see p. 637.

(g) 3 Mylne & K. 544.

(i) 2 Ves. & B. 134.

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must be for this reason :—that the persons originally intended to receive the benefit of the foundation may, by the association of other persons with them, receive a greater benefit from it than they would otherwise do.

May 4.—THE MASTER OF THE ROLLS (after stating the facts of the case, proceeded.) The complaints are first, that exhibitioners are chosen from among strangers and free boys equally ; secondly, that children whose parents have *not been resident within the limits for two years are ex- [*464] eluded from the school ; and thirdly, that young boys are discouraged from entering the school, and consequently that boys entitled to the benefit of the school, are obliged to have a prior or preparatory education to fit them for education in the school as now conducted.

The first of these complaints raises a question of considerable importance with respect to the powers given to these trustees by the original foundation, by the acts of parliament and by orders of this court ; and also with respect to the mode of conferring the most substantial benefit upon the boys who are peculiarly entitled to the benefits of the foundation, whether it shall be by placing them in free and unprotected competition with other boys, or by giving them an exclusive right. [His Lordship then stated the proceedings before the Master and Lord Eldon in 1806, and continued.] Now considering that the Master had in his report set forth the evidence, by which it was shown, that during twenty-five years, only twenty-one exhibitioners had been elected from foundationers, and that forty-two had been elected from scholars not on the foundation, and that he relied on that fact as a principal ground for disapproving the scheme ; and that by the very words of his order, Lord Eldon gave the trustees leave to elect more exhibitioners in the manner they had previously done ; it appears to me, that he must on deliberation have considered, that exhibitions might be given to scholars not on the foundation ; and being of that opinion, and it not appearing that any circumstances materially affecting this question now exist, which did not exist at the time when the question was brought under the consideration of Lord Eldon, I think that I am not at liberty to do any thing which is inconsistent with it. If any *alteration is to be made in this respect, it must I [*465] think be by higher authority than mine.

With respect to the second complaint—that children whose parents have not been resident for two years within the limits are excluded—it is founded on a resolution of the trustees, dated the 6th day of July, 1830, and which was expressed as follows : [his Lordship stated it and proceeded :]

It will be observed, that the effect of the resolution is not to exclude the boys which are referred to, further than from one annual meeting of the trustees to another, it does not in any way affect the boys who may be the children of old residents, or, after the next annual meeting of trustees, the boys who may be the children of parents come *bona fide* to reside within the limits ; and supposing the resolution to be made, as it purports to be, for

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the protection of the old residents, it would seem to be free from objection. If, indeed, the income of the property be so large as it was stated to me to be, and the number of free boys be so small as is stated in the affidavits, it is difficult to see any reason for supposing that such a regulation is necessary for the protection of the old residents; and if it is not necessary, it appears to me that it ought not to stand. Considering, however, that no instance of inconvenience or of any individual being excluded from the school under this resolution is stated, it scarcely appears to me that any order on the subject is required or would be proper; it may, I think, be safely left to the discretion of the trustees.

With respect to the third complaint—that young boys are discouraged from entering the school—I cannot help thinking, upon the evidence [*466] before me, that it has some *foundation in fact, and if the fact be so, it is prejudicial to the interest of the free boys.

It appears that, as a classical school, the school has greatly flourished under the mastership of Dr. Arnold. When he was appointed master there were 136 scholars: at Christmas last there were 278. The boys in the upper school in 1827 were 111: at Christmas, 1838, they were 240. In 1827 the boys in the lower school were twenty-five; in 1838 they were thirty-eight; an increase, but much less in proportion, than the increase of boys in the upper school. At Christmas, 1831, and at midsummer, 1834, the boys in the lower school were 112; and, looking at all the evidence on the subject, the state of the school from time to time, the declarations imputed to Dr. Arnold and Sir Grey Skipwith and not denied, and the masters who have been employed, it does, on the whole, appear to me that it has been thought desirable to discourage the entrance of boys under twelve years of age, and I do not think that such a course of proceeding is or can be beneficial to the objects of the charity.

The school is by the founder designated as a grammar school; but the boys are to be taught writing and arithmetic in all its branches, *i. e.* more than grammar and classical learning is to be taught; and taking the test mentioned in the affidavit of Dr. Arnold, it appears to me that those who are qualified in other respects ought to be admitted if they can read English and are capable of being taught the first elements of grammar.

It does not appear that any boy for whose admission application has been made, has ever been excluded for being too young; but the expressed opinion of Dr. Arnold must, of itself have been a discouragement; and [*467] though I cannot attribute the state of the school, in this *respect, to the design supposed by Mr. Wratishaw, and cannot see the propriety of ordering forms to be established before there are boys to be instructed upon them; yet it does appear to me that provision ought to be made for the instruction in the school of the young boys who can read English, and are capable of being instructed in the first elements of grammar.

1839.—The Attorney General v. Clack.

It being intimated that the trustees were desirous of giving effect to this judgment, the court suspended making any order on the petition.

THE ATTORNEY GENERAL v. CLACK.

1839; January 16, 18.

Pending an information filed for the purpose of having new trustees of a charity appointed in the place of some who were dead, the surviving trustees took upon themselves, without the sanction of the court, to appoint new trustees: Held, that though this was neither a contempt nor an act altogether void, yet it imposed upon the trustees the necessity of proving, by the strictest evidence, and at their own expense, that what had been done was perfectly right and proper; and the case not appearing altogether clear, the appointment was set aside, and the trustees were ordered personally to pay all the extra costs occasioned by their act.

THE object of this information was the appointment of four new trustees of the charity estates to act with four surviving trustees, and for the arrangement of the amount of a lien claimed by a Mrs. Bartlett on the title deeds of the charity estate: it also prayed an injunction to restrain the four surviving trustees of the charity from appointing new trustees or conveying the charity estates in the mean time. The trustees, however, pending the proceedings, appointed new trustees, and arranged the amount of the lien due to Mrs. Bartlett. The points argued were, as to the effect of these acts of the surviving trustees pending the *suit. The facts will be found fully [*468] stated in the judgment of the Master of the Rolls.

Mr. *Pemberton* and Mr. *Willcock*, for the relators.

Mr. *Kindersley* and Mr. *Stuart*, contra.

Mr. *G. Russell*, for Mrs. Bartlett.

Mr. *Pemberton*, in reply.

January 18.—THE MASTER OF THE ROLLS:—I cannot help expressing very great regret at the mode in which this matter has been conducted. The case is one of the most simple kind in its origin; there was a charity which was to be administered by eight persons; when those eight persons were reduced to four, the remaining four were to appoint eight other trustees. Some question is raised whether all the eight were to be new trustees, or whether the remaining four might not constitute a portion of the eight: it is not very material for the purposes of this suit which way it was: but the remaining four were to appoint new trustees. About the middle of the year 1835, there were four remaining: one of those four had the misfortune to be affected by paralysis, in consequence of which, his mind was, in some degree at least, affected; and it had been considered by the other trustees, whether they ought not to present a petition to the court, for the purpose of having its assistance in the appointment of the new trustees whom it became their duty to appoint. It is said, that they were advised that they had not sufficient

1839.—The Attorney General v. Clack.

evidence that Mr. F., who was the invalid trustee, was in such a state of mind as to make it imperative upon the court to interfere. Those [*469] who adopt that argument or those who gave that *advice seem to have totally forgotten the jurisdiction which this court has, to interfere in matters of discretion in these cases of charity, even where assistance may not be wanted in aid of a right. At the time when things stood thus with respect to the trustees, the situation of the property was such as to be worthy of some consideration; though I must say, that considering the nature of this charity, the questions which arose upon it were of a very trifling nature, and might very easily have been settled. There was a demand for costs against the charity on the part of a person of the name of Bartlett, who, being a re'ator, seems also to have been solicitor in the prosecution of a former information, upon which an order had been made; he had a considerable demand for costs, under an order which had been made in that suit in the year 1826; that suit, however, was so prosecuted, that the order was not, as it seems, drawn up till the year 1829. There was at the time a sum of 381*l.*, the amount of rents previously received, which remained in the bank in which one of the trustees was a partner, subject, however, to be called out by virtue of bankers' notes which were in the possession of the solicitor of the late Lord Devon, who had also a demand for costs; but setting aside the consideration of the latter demand, there was on the one hand a demand for costs on the part of Mr. Bartlett, who had the title deeds of the charity property in his possession, and on the other hand, there was a sum of 381*l.* lodged in the bank, and also a sum of stock remaining in the Bank of England in the names of two of the trustees, which might have been a fund very properly applicable to the payment of those costs. In this state of things, the information is filed—an information, which, as it is stated, contained no imputation of misconduct against the trustees—which alleged no mis- [*470] application or nonapplication of the *charity funds—which did not even ask for an account of the trustees' receipts and payments on account of the charity, but which asked, that new trustees might be appointed, that the lien which was claimed by Mr. Bartlett (if he had any lien) might be satisfied, and that the outstanding property belonging to the charity might be got in. I do not think that there was any impropriety in filing that information; it seems to me to have been justified by the state in which the charity then was. I wish indeed that I had been informed whether, prior to the filing of the information, application had been made to the remaining trustees, to see how far they would consent or agree to do that which was right, without incurring the expense of this suit; as that is not stated to be so, I take it for granted that no such prior application was made, and we find in the evidence of one of the witnesses, that Mr. F. complained that the information had been filed at the relation of his friend and acquaintance, and that he considered it was unneighborly and unkind—it is not material what were the exact words; the information, however, was filed, containing no

1839.—The Attorney General v. Clack.

improper charge and asking for nothing which the situation of the charity did not seem to require. That being so, and considering that the trustees were themselves in a state of difficulty and perplexity with respect to the appointment of new trustees, one is a little surprised that they did not immediately take advantage of the information thus filed, and ask for the directions of the court, to relieve them from the difficulties under which they then labored. Instead of that, and upon their own power and authority, they immediately proceed in their own way to settle these matters without the concurrence, guidance, assistance or protection which the court would certainly have afforded them; they come to some agreement with respect to the claim which was made by *Mrs. Bartlett, the representative of [*471] her husband, and to the funds that were applicable to the satisfaction of that claim; and they proceed through the difficulties which beset them, to the appointment of new trustees and the execution of a conveyance to those new trustees. They state that Mr. F., whose state of mind had been a difficulty in their way before, had considerably recovered; and they took upon themselves, and at their own risk, to have it ascertained according to their own method, that Mr. F. had recovered his state of mind sufficiently to enable him to perform the act required of him. They have him examined by medical persons, and having satisfied themselves by this examination, they determine for themselves that Mr. F. is in a proper state of mind; and shortly after they were served with the subpoena, they have the deeds prepared, and have them executed in the beginning of November; they then put in their answer, in which they state what they have done in that respect, but they wholly omit to state that they have made any arrangement with respect to the funds—they conceal from the relators and from the court that they had entered into any arrangement of that kind. The case, as far as it was known to the relators, appeared in that respect exactly in the situation in which it was at the time when the information was originally filed in the month of October; the consequence is this, that a supplemental information was filed stating the additional fact, which had been communicated by the answer, that the remaining trustees had taken upon themselves to determine upon the state of mind of Mr. F., and to determine who were the proper persons to be appointed new trustees, and had actually executed a deed for that purpose. The consequence of this mode of proceeding is certainly very much to be regretted, and if the costs of this information were to fall upon the charity, it would indeed be very deplorable. *The parties [*472] proceed into evidence at great length, many witnesses are examined on both sides, for the purpose of inducing the court to believe what was or what was not the state of Mr. F.'s mind—whether he was in a state of mind competent to do the act. In the next place evidence is gone into, at very great length, for the purpose of showing that the persons who were selected to be trustees, were in all respects proper persons to be trustees, and that in fact if they had been chosen under the direction, and with the assistance and

 1839.—*The Attorney General v. Clack.*

protection of the court, better men could not have been found. This cause now comes to a hearing, enormous expense has been incurred, and the question is, what is to be done for the good of the charity? In the first place, I am of opinion that with respect to the funds there ought to be an inquiry, whether any arrangement has been made between the parties for the settlement of the lien, and if there has been such, whether it can be carried into effect, and whether it will be beneficial to the charity that it should be carried into effect. With respect to the appointment of the trustees, the question no doubt is a very important one. What is asked here is, that the appointment may be declared null and void, and that it may be declared to be a contempt of court. Now I am of opinion that I can make no such declaration as to its being a contempt of the court; but I am of opinion, that the conduct of the trustees in making the appointment of their own authority, under all the circumstances of the case and after the filing of the information and after they had been served with a subpoena, was on their part an extremely improper act. I think they ought to have put in their answer and to have stated the case truly,—to have stated in their answer, if they could have stated

truly, that Mr. F. was recovered, and was competent to act; they
 [*473] ought to have stated they were willing to appoint new trustees, and they ought then to have applied to the court, either that they might be at liberty to appoint new trustees, or that there might be a reference to the Master for that purpose. It is said that an application might have been made on the part of the relators, but how could it? Did the defendants state their case fairly and candidly upon the answer, so as to enable the relators to do what would have been proper upon such an occasion? so far from it, they first of all attempt to complete the act, and then leave the relators to such means as they had to get rid of it, and also get rid of the deed. I am of opinion upon such a case as this, that the appointment after the filing of the information, though not to be considered as an act altogether void in itself,^(a) did put the burden upon the defendants of proving, and that by the strictest evidence, that what they had done was perfectly right and proper, and also imposed on them the necessity of paying the costs of such proof. They choose to take upon themselves the risk of doing that act, and of withdrawing the matter from the jurisdiction of the court: as they thought fit to do so, they are bound to prove that that which they had done was rightly done; and I am of opinion that according to the practice of this court, the expense of bringing forward that proof should fall upon them; and if the matter remains in a state of difficulty, I think that there is ample authority and jurisdiction for the court to say, that the appointment ought not to stand at all. And considering the whole of this matter, it not being a case of persons who were clearly competent in respect of numbers, or in which they might have acted if they had all been competent,—considering the nature of this case

(a) See *Webb v. Earl of Shaftesbury*, 7 Ves. 480.

1839.—Traile v. Bull.

and the evidence which has been gone into, and the circumstances attending the *appointment, I think they have not shown that the [*474] appointment was perfectly right and proper, and I am therefore of opinion that it ought not to stand at all, but ought to be set aside, and it must therefore be referred to the Master to appoint new trustees. The case remains in the state in which it would have been upon the first information, which, it appears to me, was properly enough filed. The answer undoubtedly showed improper conduct on the part of the trustees; and I think that upon that information, there must be the reference which I have mentioned, to inquire as to the arrangement with Mrs. Bartlett, and to appoint new trustees: the costs which have arisen from this long investigation, (I do not say the costs of the first information but of the second information,) and of the evidence gone into with respect to Mr. F., and with respect to the fitness of the new trustees, must be borne by the defendants; and considering the resolution which has been entered into so improperly—that those costs are to be borne out of the charity funds—I consider it my duty to take care that the costs directed to be borne by the defendants shall be paid by them personally; the other costs will be reserved.

His Lordship afterwards gave leave to the new trustees who had been appointed to propose themselves before the Master.

*TRAILE v. BULL.

[*475]

1839: July 6, 20.

A plaintiff having obtained an order of course to amend, after the time limited for that purpose had expired, and the defendant being in a condition to move to dismiss for want of prosecution: Held that a single notice of motion to discharge the irregular order and to dismiss the bill was not irregular on the ground of multifariousness.

THIS was a motion on behalf of the defendant, "that an order to amend, dated the 18th of May last, might be discharged for irregularity, and that the bill might stand dismissed with costs," under the following circumstances:—

The defendant's answer was filed on the 25th of January, 1839, the time for excepting under the fourth general order(a) expired on the 22d of March. The time limited by the thirteenth general order(b) for obtaining, without notice, the common order to amend the bill, expired on the 3d of May, and there being but one defendant, he was, on the 17th of May, in a condition to move to dismiss the bill for want of prosecution under the sixteenth general order;(c) on the 18th of May, however, the plaintiff obtained the *ex parte* order to amend his bill.

Mr. J. Evans, in support of the motion. The order to amend is clearly irregular, and the defendant might have treated it as a nullity, *De Geneve v.*

(a) 2 Russ. App. 6.

(b) 2 Russ. App. 8.

(c) 1 Russ. & My. 770.

1839.—Traile v. Bull.

Hannam, (a) or have moved to discharge it. (b) The recent case of *Lloyd v. Wait* (c) shows that the two objects sought on the present occasion may be joined in one notice of motion.

[*476] *Mr. *Tripp*, contra. The notice of motion is multifarious, seeking two distinct objects, namely, the discharge of an order and the dismissal of the bill. The defendant having given notice to discharge the order of the 18th of May, has thereby recognized it as an order, and cannot now say it is a nullity; until the order to amend has been discharged, which it cannot be on this notice of motion, the motion to dismiss cannot be made.

He stated that the subject matter of the suit was properly limited to the separate use of Mrs. Traile when unmarried, and that the husband and wife had been joined as co-plaintiffs. He asked, therefore, that the case might stand over until the Lord Chancellor had delivered judgment in *Tullett v. Armstrong*, (d) in order to give the plaintiff an opportunity of correcting, if necessary, the frame of the record. That this had been done in *England v. Downs*. (e)

July 20.—THE MASTER OF THE ROLLS:—The time for amending having expired and the defendant being in a situation to move to dismiss the bill the plaintiff irregularly obtained an order to amend; and now the defendant moves that that order to amend may be discharged, and that the bill may be dismissed for want of prosecution. The complaint is, that it is irregular to join these two things together. If the bill were dismissed, the order to amend would go for nothing; why then should the notice be invalid merely because it asks for a little more than the party thinks is required? I do not think it so now, nor did I when the motion was originally made; and it being

[*477] said there *was an authority in point, it stood over for the purpose of producing it. No authority has been produced, and thinking that there is nothing improper in this motion, I must grant it; the consequence is that the plaintiffs must undertake to speed the cause, unless there is any special ground. There are specialties in this case which create the difficulties adverted to by the plaintiff's counsel; but the general orders have pointed out particular instances in which a motion to dismiss for want of prosecution shall not prevail; (g) and the existence of a doubt as to the proper joinder of husband and wife as co-plaintiffs in a suit, is not among them. I think the cause ought not to be stayed for that reason; and the plaintiffs must, therefore, undertake to speed, if they desire to go on with the suit.

(a) 1 R. & Myl. 495.

(b) *The King of Spain v. Hullett*, 1 R. & Myl. 7. n.

(c) Before the Lord Chancellor, May 22d, 1839.

(d) *Ante*, p. 1.

(e) *Ante*, p. 96, and 8 Sim. 554, n.

(g) Under the sixteenth order the bill is to stand dismissed, except in three cases; *first* where the plaintiff undertakes to speed; *secondly*, where he undertakes to hear the cause on bill and answer; and *thirdly*, where it appears that the plaintiff is unable to proceed, by reason of any other defendant not having sufficiently answered, and that due diligence has been used to obtain an answer.

1839.—Gath v. Burton.

*GATH v. BURTON.

[*478]

1839: July 30.

A bequest was made by a testator to his debtor, on condition of his paying his debt before, or to his (the testator's) executors immediately after, his death; the testator afterwards accepted a composition, and the remainder of the debt continued unpaid: Held, that the legatee was nevertheless entitled to the legacy.

THE testator Francis Marris, by his will bearing date the 20th day of February, 1837, amongst other legacies, gave and bequeathed unto the plaintiff Samuel Gath, the sum of 500*l.*: and the said testator directed that the said legacy should become an interest vested in the said legatee immediately upon his decease.

On the 23d of December, 1837, the testator made a codicil to his will, in the words following:—"I, Francis Marris, of, &c., do add this a codicil to my annexed will made and signed on the 20th day of February, 1837, containing sixteen sheets and numbered from 1 to 16: viz. in pages 3, and 4, of my will, I give and bequeath to Samuel Gath the sum of 500*l.* for his own sole, separate and absolute use and benefit; on the 1st of February, 1837, I lent Samuel Gath 2000*l.*, which was paid him by my acceptance of a bill drawn upon me at four months' date, and accepted, payable on the 4th of June at Glyn, Mills & Co's., bankers, London: this acceptance was to lie in the hands of his banker in Liverpool until it became due, and he was to provide for the payment of it; Samuel Gath, becoming involved in his circumstances, was unable to take up this bill; as such, I took it up in cash on the 4th of June: now my desire and will is, that if the aforesaid Samuel Gath shall pay the aforesaid 2000*l.* before, or to my executors on their application immediately after my death, he shall receive the legacy of 500*l.* left him by me, but not otherwise."

On the 19th of March, 1838, the testator, with other creditors of Samuel Gath, agreed to take a composition *of 6*s.* 3*d.* in the pound [*479] on his debt of 2000*l.*, and a rateable share of two debts which were to be assigned to rustees for the benefit of Samuel Gath's creditors, in full discharge of his debt against him.

This agreement was carried into effect by a deed of the 26th of April, 1838, whereby the testator released Samuel Gath from the debt in consideration of the amount of composition paid and secured.

On the 15th of May, 1838, the testator died, and his executors immediately after his death applied to Samuel Gath for payment of the 2000*l.*, or so much as remained unpaid.

To a bill filed against the executors, containing the above statement, and praying payment of his legacy of 500*l.* with interest, the executors filed a general demurrer, which now came on for argument.

Mr. Walker, in support of the demurrer, argued, first, that it was clear that the condition had not been fulfilled; secondly, that the performance of the

1839.—Gath v. Burton.

condition had not become impossible, for the legatee might still pay to the executors of the testator the portion of the 2000*l.* now remaining unpaid; and thirdly, that having regard to the nature of the condition and to the circumstances, especially the mention of the insolvency of the legatee in the codicil, it was evident that there had been no dispensation or waiver of the condition imposed by the codicil.

He also argued that the testator had only intended to release his debtor, *qua* debtor, and not as a person who was to take a bounty under his will, upon the condition of reimbursing the testator's estate the money [480] *which had been paid by him on account of the legatee. He cited *Smith v. Cowdery*, (a) *Stanton v. Knight*. (b)

Mr. *James Booth*, in support of the bill, was not called on by the court.

THE MASTER OF THE ROLLS:—I think, upon the true construction of this will and codicil, and having regard to what the testator afterwards did, that this legacy is still payable. He had become a creditor of this legatee to the amount of 2000*l.*, and he directed, that if the 2000*l.* should be paid, the legatee was to receive the 500*l.* I apprehend that he might, if he had chosen, immediately afterwards have forgiven this debt altogether; and if he had done so, I think this legacy would have been payable. He joined in the composition deed, and forgave the debt on certain conditions; and under these circumstances, I think this legacy is still payable, and the demurrer must therefore be overruled. (c) [1]

(a) 2 Sim. & S. 358.

(b) 1 Simons, 482.

(c) See Co. Lit. 206, a; Litt. 344; 1 Roper on Leg. 655—692; *Graydon v. Hicks*, 2 Atk. 16; *Aislable v. Rice*, 3 Mad. 256; *Darley v. Langworthy*, 7 Brown's P. C. 177.

[1] "Where a legacy or devise is given upon a condition, either express or implied, the legatee or devisee cannot in equity be permitted to take the benefit thereof without performing the condition upon which it is given. And if he receives the legacy, or enters into possession of or disposes of the property devised, without previously performing the condition, this court will compel him to perform it.—The case under consideration is an ordinary case of election like a legacy or bequest in lieu of dower. In such cases, where the legatee or devisee has a right independent of the testator, if the devise or bequest is upon condition either express or implied, that such right shall be relinquished if the party accept of the conditional gift, it is in equity a relinquishment of the right; and this court will compel him to execute a proper release or conveyance where it is necessary to extinguish the right at law. The party who is bound to make the election is undoubtedly entitled to a reasonable time to inquire and ascertain whether it is for his interest to accept the gift and relinquish the right. But if he accept the gift without waiting to ascertain what is his interest in the matter, his election is determined, and he cannot afterwards refuse to relinquish the right on the ground that the gift was not a fair equivalent therefor." *Walworth, Ch. Spofford v. Manning*, 6 Paige, 383, 388, 389. See further as to conditional bequests. *Millick v. The President and Guardians of the Asylum*, Jac. 180. *Barber v. Barber*, 3 Myl. & Cr. 696, and n. 1. Ibid. *Cooper v. Remsen*, 3 Johns. Ch. Rep. 382. S. C. 5 Johns. Ch. Rep. 459. *Lenox v. Lenox*, 10 Sim. 400. *Morris v. Kent*, 2 Edw. Ch. Rep. 173. As to legacy by creditor to debtor, see further *Campbell v. Graham*, 1 Russ. & M. 453. *Davis v. Elmes*, ante 131.

1839.—Hereford v. Ravenhill.

*HEREFORD v. RAVENHILL.

[*481]

1839 : July 10.

Where testator directs his personal estate to be converted into real estate for several purposes, some of which fail, the heir is not, after satisfying the purposes which can take effect, entitled to the personalty as being impressed with the character of realty.

A testator directed his trustees to invest his personal estate, as soon after his death as a convenient purchase could be found, in a real estate, and settle it according to certain limitations.

These limitations having become exhausted before the personal estate had been invested: Held, that the heir at law of the testator was not a necessary party to a suit to have the rights to the fund declared.

THE testator, Howarth Croke, subject to the life estate of his wife, had an absolute power of appointment over estates at Holmer, Dilwyne and Lingen.

By his will he devised these estates to his son Charles for life, with remainder to the first and other sons of Charles in fee, with remainder to the daughters of Charles as tenants in common in fee, with similar limitations to his son John and his issue; and in default thereof, the testator devised the estates as follows:—that, at Holmer, to Thomas Church (who died in the testator's lifetime) in fee; that, at Dilwyne, to Frances Weare (who died in the testator's lifetime) in fee; and he devised the estate at Lingen to Hannah Price in fee. The testator also gave his ready money and money which should be due and owing to him, save as therein mentioned, to trustees, in trust, "as soon after his decease as a convenient purchase could be found," to invest it in the purchase of freehold, leasehold or copyhold hereditaments, and to settle the same to the use of his wife for life; and after her decease, upon the same uses and trusts as were thereinbefore declared concerning his hereditaments at Holmer, Dilwyne and Lingen; and in the mean time to lay the same out in the funds and pay the dividends, to the person to whom the rents of the premises to be purchased would, for the time being, belong. And the testator gave and bequeathed the residue of his goods, chattels and personal estate to his wife absolutely.

*The testator died in 1788, having in his lifetime sold the property [*482] at Lingen.

Thomas Church and Frances Weare both died in the testator's lifetime: John Croke, the son, died in 1794, without issue: Mary Croke, the widow, died in 1802: Charles Crook died in 1835, a bachelor and unmarried.

The personal estate of the testator, Howarth Croke, not having been invested, and the ultimate limitations to Thomas Church and Frances Weare having failed by their deaths in the testator's lifetime, the question in this cause was to whom that fund belonged.

The heir at law of the testator was not made a party to the cause.

Mr. Pemberton, and Mr. Stinton, for the plaintiff, at the hearing of the cause, asked for a decree for the usual accounts of the personal estate, and for inquiries.

1839.—*Lee v. Fernie.*

Mr. *Collins*, on the part of the trustees, objected that the suit was defective for want of parties, in consequence of the heir at law of the testator Howarth Croke, who might be entitled to the fund as impressed with the character of realty, not being before the court. He cited *Cowley v. Hartstonge*,^(a) and *Cooke v. The Stationers' Company*.^(b)

Mr. *James Bacon* for other parties.

Mr. *Pemberton* submitted, that whatever doubt might formerly have existed, the point had, after argument, been finally settled by Sir C. C. Pepys, in the case of *Cogan v. Stevens*,^(c)

[*483] *THE MASTER OF THE ROLLS said he was of opinion that the heir at law was not a necessary party, because it had been decided in the case referred to, that where a testator directed his personal estate to be converted into real estate for several purposes, some of which failed, his heir was not, after satisfying the purposes which could take effect, entitled to the personality as being impressed with the character of real estate.[1]

LEE v. FERNIE.

1839 : July 26.

A. B., being desirous of voluntarily settling property on the female descendants then in existence of C. D., by deed reciting this desire and that certain persons therein named were the only descendants then in life of C. D., settled a part of the property on the persons so named, and reserved to himself a power of appointing the remaining part of the property amongst such several persons before named, which, in default of appointment, was given to those several persons named; he afterwards discovered that there were other descendants in existence of C. D., who had been omitted, and, to remedy the omission, he appointed a part of the fund to an object of the power, upon his executing bonds for the payment to the persons newly discovered, of the amount when received: Held, that the appointment was void, and that the court would not, in a suit to have the rights of the parties to the appointed fund declared, determine whether the case was such as to entitle the parties to have the settlement reformed according to the intention of the settler.

JEAN LAW executed a deed of entail in 1703, and a deed of ratification and confirmation in 1707, whereby, subject to certain limitations of the

(a) 1 Dow, 361.

(b) 3 Myl. & K. 264.

(c) Rolls, 24th Nov. 1835 In this case *Lewis Stephens*, by his will, directed his executors immediately to lay out the sum of 30,000*l.* in the purchase of an estate, the income of which he settled on one for life, with remainder to others in tail, subject to which the estate, which was to be purchased and always run in the testator's name, was given to a charity; the money was not laid out when the limitations prior to that to the charity became exhausted; and the gift to the charity being void under the statute of mortmain, it was held that the next of kin, and not the heir at law of the testator was entitled to the fund.

[1] When the heir is a necessary party or not, see further *Champion v. Brown*, 6 Johns. Ch. Rep. 410. *Bower v. Idley*, 6 Paige, 46. *Souillard v. Dias*, 9 Paige, 394. *Story v. Fry*, 1 Yo. & Coll. C. C. 603. *Roberts v. Marchant*, 1 Hare, 547.

1839.—*Lee v. Fernie.*

*Lauriestown and Randlestown estates, which failed on the death of [*484] her great grandson Francis J. W. Law without issue, "she obliged her other nearest heirs whatsoever to sell those estates, and apply the produce amongst the children of her seven children, giving one-seventh to each stock."

Francis J. W. Law having become entitled to these estates, he, by a deed dated the 24th of December, 1821, reciting the deeds of 1703 and 1707, and that he was seised of the estate in fee simple, unfettered by the reservations, provisions, conditions, limitations and restrictions contained in the deed of entail; and further reciting that he was advised that the said ratification and obligation executed by Jean Law, had become lapsed by the operation of prescription, but that he was nevertheless desirous of carrying the intentions of the said Jean Law into effect with respect to such of the female descendants of the said Jean Law as were then in existence, v.z: the female descendants of Andrew Law the fourth son of Jean Campbell, of William Law her second son, and the descendants of Margaret Hay, (all the female descendants of the other children of Jean Campbell having failed;) it was witnessed, that Francis J. W. Law conveyed the estate to trustees, in trust to sell, and make certain payments, and invest the residue; and after reserving to himself a life interest therein, he gave one-seventh "to James Hugh Grandison and George Fernie, *being the only descendants then in life of the said Andrew Law*:" he then gave other portions of the fund to other persons specifically named; and he reserved to himself the power of appointing two-sevenths and two-fourths of one-seventh of the fund "to and amongst the several persons thereinbefore named," in such proportions as he the said Francis J. W. Law should appoint; and in default of appointment "this portion was given over [*485] to the persons to whom the other part of the fund had already been given.

After the execution of this deed, it turned out that James Hugh Grandison and George Fernie were not the only descendants then in life of the said Andrew Law; and that George Fernie had two brothers and two sisters, namely, Robert Fernie, James Fernie, Margaret Mills, and Jane Fernie.

By a deed dated the 25th of November, 1825, Francis J. W. Law appointed to certain persons, who were objects of the power, a portion of the two-sevenths and one-half of another one-seventh of the purchase money of the estate, which had then been sold; and he appointed all the residue thereof to James Hugh Grandison, for his absolute use and benefit. This deed contained a power of revocation and new appointment of the funds thereby appointed.

By arrangement between Francis J. W. Law and James Hugh Grandison, the latter on the same day executed to the four persons who had been omitted in the deed of December, 1821, bonds conditioned for the payment to them of certain sums of money as next mentioned. By the first of such bonds,

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dated the 25th of November, 1825, James Hugh Grandison became bound in the penalty of 1200*l.* to Robert Fernie, with a condition, whereby, after reciting the deeds of December, 1821, and November, 1825, and "that although the said trust disposition was made by the said Francis J. W. Law upon the express principle and for the declared purpose of providing for the existing descendants of his great grandmother Jean Law in the female line, out of the produce of the said lands and hereditaments, yet it then appeared, that [*486] through inadvertence or want of information, four *of such descendants, to wit, the said Robert Fernie, James Fernie, Margaret Mills and Jane Fernie, were wholly unprovided for by the said trust deed; and further reciting that the said Francis John William Law, being unable to supply the said omissions out of those shares of the said trust fund which were subject to his appointment, consistently with the terms of the said power, and the said James Hugh Grandison being anxious that the said trust disposition should not be impeached on account of such omission, and that the wish and intention of the said Francis John William Law should be to a certain extent fulfilled, he the said James Hugh Grandison had voluntarily determined to appropriate and settle one moiety of the residuary fund aforesaid appointed to or in favor of him the said James Hugh Grandison by the said deed poll or instrument of appointment, unto and for the benefit of the said Robert Fernie, James Fernie, Margaret Mills and Jane Fernie, in equal shares; and in further performance of such determination, had entered into the above written bond or obligation, subject to the condition thereafter expressed; the condition of the said bond was declared to be, that if the said J. H. Grandison, his heirs, executors or administrators, should, immediately upon or within one calendar month after the actual transfer should have been made to him or them, fully and absolutely of the residuary share of and in the trust moneys and securities so appointed to him in and by the said deed poll of appointment of the 25th day of November, then instant, well and truly pay or cause to be paid unto the said Robert Fernie, his executors, administrators or assigns, in case the said Robert Fernie should have survived the said F. J. W. Law, but in case the said Robert Fernie should have died in the lifetime of the said F. J. W. Law, leaving issue him surviving, and who should [*487] have survived the said F. J. W. Law, *then if the above bounden James H. Grandison, his heirs, executors or administrators, should pay or cause to be paid unto such issue of the said Robert Fernie, if more than one, in equal shares and proportions, such a sum of lawful money of Great Britain, not exceeding the sum of 600*l.*, as should be equivalent to one full and equal eight part or share of the moneys, stocks, funds or securities which should become transferable and be transferred to the said James Hugh Grandison, his executors or administrators, by virtue of, or under the said deed of appointment, such sum of money to be accepted by the said Robert Fernie, his executors, administrators or assigns, or his or their issue, in full satisfaction of his or their claims and demands upon the before-mentioned

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estate or the proceeds thereof, under the said deed of ratification and obligation executed by the said Jean Campbell as aforesaid, or otherwise howsoever, the said bond should be void, otherwise should remain in full force, virtue and effect.

Similar bonds were given to James Fernie, Margaret Mills and Jane Fernie.

The bonds, when executed, were delivered by Francis J. W. Law to his solicitor, with directions to him not to deliver the same to the respective obligees therein named, until James Hugh Grandison should be in the actual possession of the funds to which he was to become entitled under the deed of appointment.

This bill was filed by two of the trustees of the deed of December, 1821, to have the rights of the parties declared as to a sum of 3205*l.* 6*s.* 3*d.*, three per cent. reduced, part of the purchase money, which had been reserved to answer doubtful claims, and particularly the claims of parties under the deed of appointment of *November, 1825, and the bonds given [*488] by Grandison to the four persons named.

Mr. *Pemberton* and Mr. *Bacon*, for the plaintiffs, and Mr. *Tinney*, Mr. *Girdlestone* and Mr. *Jeremy*, for other parties, contended, that though Grandison was an object of the power, and an appointment to him unfettered with any condition would have been good, yet, the appointment, having been made on the understanding that the appointed fund should be handed over to persons who were not objects of the power, was invalid: (a) it was an attempt to do indirectly, that which Francis J. W. Law had not the power of doing directly.

Mr. *Richards*, and Mr. *Glasse*, for the obligees of the bonds, contended that the settlor of the property clearly intended to include them in the deed of December, 1821, and to secure them a portion of the property, and either through inadvertence or want of proper information on the subject they had been omitted. That if the settlor, when he discovered the error, had come to this court, it was clear that upon the same evidence the deed would have been reformed, and the names of these persons would have been introduced, as was done in *Barstow v. Kilvington*, (b) and *Jenkins v. Quinchant*; (c) so that these parties were, equitably, objects of the power.

That equity looked only to the substance of an appointment, and under a power to appoint to issue held an appointment made upon marriage to the husband of such issue to be good; *Routledge v. Dorril*. (d) That a *power reserved by the owner of the estate making a voluntary settlement should be construed liberally, *Madison v. Andrew*; (e) and there appeared some acquiescence in this case on the part of the persons in-

(a) See *Daubeny v. Cockburn*, 1 Mer. 626; *Farmer v. Martin*, 2 Sim. 502; *Arnold v. Hardwicke*, 7 Sim. 343; *Palmer v. Wheeler*, 2 Ball. & B. 18. [2 Sim. 512, n. 1. 2 Keen, 361, n. 1.]

(b) 5 Ves. 593.

(c) Ibid. 596, n.

(d) 2 Ves. jun. 357; and *Hewitt v. Lord Dacre*, 2 Keen, 622.

(e) 1 Ves. sen. 60.

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terested in default of appointment, which should have some weight ; *Anderson v. Dawson.*(a)

Mr. Kindersley, Mr. Sidebottom and Mr. Moor, for other parties.

Mr. Pemberton in reply.

THE MASTER OF THE ROLLS :—It appears that Francis J. W. Law, having become entitled to the property, or conceiving himself to be entitled to it, executed this deed of December, 1821 ; and there can be no doubt but that he intended to provide for all the descendants of Jean Law there referred to : he thought he had discovered them all, and he intended to provide for all ; but referring to them by name, he made this provision for them [his Lordship stated it,] and retaining to himself the power of appointing two-sevenths and two-fourths of one-seventh “to and amongst the several persons thereinbefore named ;” the persons before named, and no others, were the persons to whom he reserved the power of appointing this portion of the fund, and in default it was settled in the manner there mentioned.

Some time after the execution of this deed, he discovered that he had not provided for all the persons he intended—he discovered four other persons, the brothers and sisters of George Fernie ; and he then executed the [*490] deed of November, 1825, and he appointed a portion *of the fund to

Grandison absolutely. I think that on this deed there is nothing to show that the appointment was not good, because it was made to persons all of whom were named in the deed of 1821. On the same day on which the deed was executed, four bonds were executed by Grandison to the four persons who had been discovered to be the descendants of Jean Law, which recites—[his Lordship read the words.]

Mr. Law did not think fit to rely upon that appointment and that voluntary disposition, and therefore he took these several obligations from Mr. Grandison, that he would, after the transfer and payment was made to him, pay the several sums of money to the several persons to whom the bonds were given. What then was this, but an intention on the part of Mr. Law to make the appointment substantially and in effect for the benefit of persons not before named in that deed ? That clearly was his intention, and having made an appointment in favor of Mr. Grandison, he immediately subjects him to these several obligations,—that is, he was intending to do indirectly that which he had been advised he could not do directly. Now, it certainly seems a hard thing that he, the author of this gift and the owner of this property, could not do this ; but he had declared a trust—he had said that it should belong to certain persons—that the power he had reserved should be exercised for the benefit of certain persons only : and I quite agree with those who advised him, that it was not competent for him, of his own authority, to alter that destination of his property.[1]

(a) 15 Ves. 532.

[1] “ A declaration of trust is considered in a court of equity as equivalent to a transfer of the legal interest in a court of law ; and if the transaction by which the trust is created is complete, it

 1839.—Parker v. Burney.

With respect to the bonds, I do not think it very clearly appears in evidence what was done with them. I think they were received by the testator, and then deposited with the solicitor; there they still remain.

*Mr. Grandison, therefore, was not to have this obligation imposed [*491] upon him, till the gift took effect, according to the directions of the deed. Now it is said, and it has been certainly very ingeniously argued, that Mr. Law himself would have been entitled to have had this settlement corrected: I will not say that he might not; but that is not the question now before me; the only question is, whether, taking the deed as it is, the power was duly executed. I am of opinion that the power was not duly executed, and that I cannot act upon any notion that I might form in this suit, where the question is not agitated, how that settlement would have been dealt with if the question had been raised, or whether it would have been corrected if a proper case had been made out.

The next point is upon what took place afterwards. An offer seems to have been made, that if the parties would agree to accept what was intended for them by Mr. Fernie within a limited time, they should have it. It is exceedingly to be lamented that they did not accept that offer; but in consequence of that offer not having been accepted, it became necessary to institute this suit, to try the strict rights between the parties: this diminishes the regret. It is clear Mr. Law meant this for them, and it is painful to see them deprived of it; but having refused to accept that which was offered, they must now be content to abide by that which the law gives them. I am of opinion that the power is not duly executed, and the property therefore goes as in default of appointment; all parties should, however, have their costs.

 *PARKER v. BURNEY.

[*492]

1839: April 30, May 4.

One of two executors appearing, from the proceedings in the cause, to be a trustee within the meaning of the 1 W. 4, c. 60, of a fund standing in the testator's name, and it being proved by affidavit that he was living out of the jurisdiction, the court, without a reference to the Master, made an order under this act for the transfer of the fund by his co-executor.

ELIZABETH SOMERVILLE was the sole executrix of the testator, Hugh Somerville.

Elizabeth Somerville, by her will, appointed William Burney, and John Hinman her executors, who after her death, proved her will.

will not be disturbed for want of consideration. If this had been a transaction resting on an agreement, not conferring the legal interest—if it had been an executory contract, this court in the absence of consideration, would not have given effect to it; but if what has been done is equivalent to a transfer of the legal interest, the parties, in whose favor the trust is created, are entitled to have the benefit of it in this court, and I am of opinion that this deed gives an interest to the plaintiffs which does so entitle them." Lord Langdale, M. R., *Collinson v. Patrick*, 2 Keen, 134, and see n. 1, *ibid*.

 1839.—*Boswell v. Tucker.*

The questions in the cause arose on the construction of the very obscure will of the testator, Hugh Somerville, a portion of whose estate consisted of funds standing partly in his own name, and partly in the name of his executrix, Elizabeth Somerville.

At the hearing of the cause on the 18th of December, 1838, the rights of the parties had been ascertained; and William Burney being out of the jurisdiction, the case now came on upon petition, praying for a distribution of the funds, and praying also that John Hinxman alone, on behalf of himself and William Burney, might, under the 1 W. 4, c. 60, be directed to transfer the funds.

It was proved, by an affidavit now produced, that William Burney was living out of the jurisdiction.

Mr. *Richards*, in support of the petition, asked that the order for a transfer might be made at once, without a reference to the Master, as it appeared, by the proceedings in the cause, that William Burney was a trustee within the meaning of the act, and as it was proved by the affidavit that he was out of the jurisdiction.

[*493] **THE MASTER OF THE ROLLS:—**The money in question forms a fund to be administered in this suit, and I think I can make the order at once; the order, however, must state, that it appears, from the proceedings in the cause, that William Burney is a trustee within the meaning of the act, and from the affidavit, that he is living out of the jurisdiction.[1]

BOSWELL v. TUCKER.

1839; March 25.

The provisional assignee of an insolvent debtor having been made a defendant to a suit by a mortgagee to foreclose the insolvent and those claiming under him, Held to be entitled to his costs, to be paid by the plaintiff, who was to add them to his security.

THIS was a bill for foreclosure: the mortgagor had taken the benefit of the insolvent debtors' act, and no creditor's assignee having been appointed, Mr. Sturgis, the provisional assignee of the insolvent debtor, was made a party defendant.

By his answer he stated, "that he did not claim any right or interest in the matters in question in this suit, other than such (if any) as might be

[1] For cases in which orders have been made without reference, see *Lippiat v. Holley*, ante 423. *Ex parte Farrow*, 1 Russ. & M. 112; and cases cited n. 2, *ibid.* *Coster v. Coster*, 9 Sim. 604. *Attorney General v. Brandreth*, 1 Yo. & Coll. C. C. 200; so, the court may itself correct a mere matter of computation in a report, without sending it back to the Master to be reviewed. *Bogart v. Furman*, 10 Paige, 496. *Taylor v. Read*, 4 Paige, 568. 1 Barb. Ch. Pract. 557. But Sugden, Ld. Ch., refused to appoint new trustees without a reference. *In the matter of Roche*, 1 Conn. & Law. 306.

1839.—*Brainbrigg v. Blair.*

vested in him as such provisional assignee as aforesaid, in trust for the benefit of the creditors of the said insolvent debtor;" and submitted, "that he was entitled to be paid by the said complainant, or in such other manner as this court might be pleased to direct, all the costs, charges and expenses incurred by him in respect of this suit."

Mr. *Reynolds*, for Mr. *Sturgis*, asked that the plaintiff might be ordered to pay his costs of suit, on the authority of *Peak v. Gibbon*,^(a)

Woodward v. Haddon,^(b) and *Weaving v. Count*,^(c) urging, that [*494] as a mere ministerial officer under the insolvent debtor's court, and having no interest, he ought to have these costs.

Mr. *Pemberton* and Mr. *Hallett*, for the plaintiff.

Mr. *Kindersley* and Mr. *Goodeve*, for other parties.

THE MASTER OF THE ROLLS:—I think I must allow these costs, though I confess I do not perfectly understand the reasoning of the cases cited. It would be perfectly right in a case where it is clear that the assignee has nothing in his hands to pay his costs. Even if he should afterwards receive any assets, it would seem that they would be the proper fund out of which to pay his costs. I give the costs because the cases authorize it.[1]

The common decree for a foreclosure was made, and it was ordered that the plaintiff should pay *Sturgis's* costs, and add them to his security.

**BAINBRIGGE v. BLAIR.*

[*495]

1839: May 28.

The bankruptcy of a trustee is a sufficient ground for his removal from that office, although he has obtained his certificate, and the trust property is in the hands of a receiver.

MR. PEMBERTON and Mr. *James Russell*, in this case, asked for the appointment of three new trustees, in the place of three trustees appointed by

(a) 2 Russ. & Myl. 354

(b) 4 Sim. 606.

(c) 6 Sim. 439.

[1] Lord Langdale's scruples as to allowing costs to the assignee in cases like the above, have been sustained by other judges in subsequent decisions, and it seems to be now settled, that he is not, under ordinary circumstances, entitled to them. In *Thompson v. Kendall*, (1840,) 9 Sim. 397, Shadwell, V. C., allowed the assignee of an insolvent mortgagor his costs, who had disclaimed, was willing to release to the mortgagee, and had distributed the assets of the insolvent among the creditors, but notwithstanding was compelled by the plaintiff to come to a hearing. These were equitable circumstances for allowing costs, without placing the allowance upon any general rule. And in a still later case, (in which *Boswell v. Tucker* was cited,) *Appleby v. Duke*, (1842,) 1 Hare, 303, Wigram, V. C., proceeding as well on general principles as the case of *Hunter v. Pugh*, before Lord Cottenham, (ibid. 307, note,) refused the provisional assignee costs from the plaintiff. The material part of the judgment of the Vice-Chancellor, is quoted by the Editor, 9 Sim. 400, n. 1. A similar decision was made in *Cash v. Belcher*, 1 Hare, 310. And see *Collins v. Shirley*, 1 Russ. & M. 338, and n. 1, 2, ibid.

 1839.—Lindo v. Lindo.

the will of the testator: the ground for the removal of one of the trustees was that he had become bankrupt.

Mr. *Wright*, for the bankrupt trustee, objected to his being removed. He argued that there was not a sufficient reason for his removal, the bankrupt having obtained his certificate in 1836, the trust estate not having lost any thing by his bankruptcy, and there being no fear of any future loss, as the estate was in the hands of a receiver; secondly, he objected, that the testator having by his will given to the trustee certain benefits attached to his office, he ought not to be deprived of them.

Mr. *Kinderley*, Mr. *Piggott*, and Mr. *S. Sharpe*, for other parties.

Mr. *Pemberton*, in reply, said that the fact of the trustee not being a responsible person was a sufficient ground for his removal from the office.

THE MASTER OF THE ROLLS:—I think this gentleman having become a bankrupt ought to be removed; but it must be done without prejudice to any interest he may claim under the will.(a)[1]

 [*496]

*LINDO v. LINDO.

1839: July 4.

A release though unlimited in its terms, held, from the recitals and context, to operate only as to a particular sum mentioned in the recitals.

An intestate at his death was indebted to D. M. in 1687*l.*; disputes, however, arose between the administrator and next of kin as to the legality of the debt, and an agreement was come to between them and the brother of the intestate, whereby, reciting that all the property had been got in and, excluding the disputed debt, amounted to 533*l.*; that doubts having arisen as to the validity of that debt, and that being desirous of maintaining the good fame and character of the deceased, the three parties had agreed to waive all questions as to the validity of the debt, and raise a fund to make good the deficiency; that the next of kin had agreed "to relinquish all claim to any residue or surplus;" that the intestate's brother should furnish 384*l.* towards payment of the debt, and the administrator should make good all the residue. It was witnessed that the next of kin released to the administrator all his right, &c., to the personal estate of the intestate, as his next of kin or otherwise, the brother covenanted to pay his part, and the administrator covenanted to pay the residue out of his own money, and also to pay all other debts, &c., of the intestate. The debt was paid, and other funds afterwards fell into the intestate's estate: Held, that the administrator was not, under the release, entitled thereto.

DAVID LINDO in his lifetime carried on business in partnership with his brother Abraham Lindo, and Moses da Costa Lindo: he died intestate in

(a) This may be done by petition. See 6 G. 4, c. 16, s. 79.

[1] New trustees having been appointed in this case, the receiver was discharged, the trustees undertaking, without entering into recognizances, to receive and to pass their accounts half yearly before the Master, in the same way as the receiver. 3 Beav. 421. Bankruptcy of a trustee is "becoming unfit" to act in trusts within the words of a power to appoint new trustees. *In the Matter of Roche*, 1 Conn. & Law. 306. If a trustee has been guilty of a breach of trust, and is insolvent or irresponsible, the court will remove him. *Van Epps v. Van Epps*, 9 Paige, 238; and see 1 Rev. Stat. of N. Y., (2d ed.) 724, § 70.

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1819, leaving his father, Moses Lindo, his sole next of kin, whereupon Moses da Costa Lindo, on the renunciation of Moses Lindo, became his administrator.

David Lindo, at his death, was indebted to several persons, and, amongst others, to Daniel Mocatta, in the sum of 1687*l.* 10*s.*, as acceptor of three bills of exchange; this sum had been lent by Daniel Mocatta to David Lindo, to enable him to pay losses incurred by him in speculations in the funds, which were stated to have been of an illegal nature. Moses da Costa Lindo was to become surety for this sum, and for that purpose he endorsed these bills. David Lindo, by a memorandum, authorized and enjoined his representatives to pay Moses da Costa Lindo all that might be due in respect thereof.

*The assets of the intestate, David Lindo, were possessed by his administrator, Moses da Costa Lindo, who paid all the claims thereon, except the debt due to Daniel Mocatta, and there then remained in the hands of the administrator a balance of 458*l.* 7*s.* 3*d.*; but supposing the debt due to Daniel Mocatta to be payable out of the assets of David Lindo, his estate would have been considerably deficient. Moses da Costa Lindo having furnished Moses Lindo with an account of the estate of the intestate, in which he included the debt due to Daniel Mocatta, and thus showing a deficiency, Moses Lindo objected thereto, and insisted on having that item struck out, alleging that the sum was not a legal debt which could be recovered against the estate of David Lindo, and that it ought not, therefore, to be charged against his estate. Considerable discussion took place on the matter, and ultimately the objected item was struck out, and another account omitting it rendered; the parties seemed to have come to an arrangement, by which it was agreed, that the balance of 458*l.* 7*s.* 8*d.* should be applied toward payment of the 1687*l.* 10*s.*, and that Moses da Costa Lindo and Abraham Lindo should pay the remainder. The debt due to Daniel Mocatta was accordingly charged in the books of Abraham Lindo and Moses da Costa Lindo to the brokerage account as a loss, and a sum of 458*l.* 7*s.* 8*d.* was carried to the credit of Moses Lindo in a cash account kept with Abraham Lindo, and Moses da Costa Lindo, and the same amount was charged, in the account of David Lindo's estate, as a payment to Moses Lindo.

These entries were made on the 6th of March, 1820, and on the same day an entry was made in one of the books of account of Abraham Lindo and Moses da Costa Lindo, by one of their clerks, stating the agreement already mentioned; this entry was signed by Moses Lindo to signify his approval of it, he thereby "giving up all claims and pretensions [*498] whatsoever against the said Moses da Costa Lindo as administrator of his late son, 458*l.* 7*s.* 8*d.*" This entry was alleged to have been made without the concurrence of Moses da Costa Lindo.

The agreement was carried into effect by an indenture, dated the 17th of March, 1820, and made between Moses Lindo of the first part, Abraham Lindo of the second part, and Moses da Costa Lindo of the third part; and

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after reciting the partnership, the death of David Lindo, and that letters of administration were obtained by Moses da Costa Lindo, upon the renunciation of his father, his sole next of kin, "and that the said Moses da Costa Lindo had, under and by virtue of the said letters of administration, collected, got in and received and converted into money *all the outstanding property* and effects of the said David Lindo;" and after reciting the debt due from David Lindo to Daniel Mocatta; upon bills which were not then due, it recited as follows: "And whereas the assets of the said David Lindo came to the hands of the said Moses da Costa Lindo as administrator as aforesaid, and *which are all the assets of the said David Lindo*, will be more than sufficient to answer and pay his debts and funeral and testamentary expenses, exclusive of the said three acceptances, by the sum of 533*l.* 7*s.* 8*d.*, which sum of 533*l.* 7*s.* 8*d.* would, therefore, in case no claim in respect of such acceptances, go to and become the property of the said Moses Lindo, as his sole next of kin; and whereas doubts have arisen, whether the said bills of exchange are valid and legal charges against the estate of David Lindo, the consideration thereof being moneys borrowed for the purpose of paying differences upon stock transactions prohibited by the statute 7 Geo. II.;

but inasmuch as all the parties to this indenture are desirous of main-
 [*499] taining and holding up the good fame and character of David Lindo and discharging his debts in full, they have mutually and reciprocally agreed with each other to waive all questions respecting the validity of such bills of exchange and the consideration thereof, and to raise a fund for making good the deficiency of the assets of David Lindo, in manner following: that is to say, that Moses Lindo should *relinquish all claims to any residue or surplus of the estate and effects of David Lindo* as his next of kin; and that Abraham Lindo should pay or allow in account to Moses da Costa Lindo, the sum of 384*l.* 2*s.* towards the payment and discharge of the said debts; that Moses da Costa Lindo should pay and make good all the residue of such debts, and of the funeral and testamentary expenses of David Lindo; and that a sum of 384*l.* 2*s.* should be applied as before mentioned, out of the moneys in the hands of Moses da Costa Lindo belonging to Abraham Lindo, as his share of the partnership profits. It was witnessed, that Moses Lindo, Abraham Lindo and Moses da Costa Lindo mutually covenanted with each other, that they would together raise a fund for payment and discharge of all the debts and funeral and testamentary expenses of David Lindo in manner and in the proportions before mentioned: and Moses Lindo in consideration of the natural love and affection which he had and bore to David Lindo during his life, and of the respect which he then bore to his memory, and in consideration of the covenant and agreement of Moses da Costa Lindo thereafter contained, remised, released and quitted claim unto Moses da Costa Lindo, and to all and every future personal representative or representatives of David Lindo, *all his right and interest, property, benefit, claim and demand, of, in or to the personal estate and effects of David*

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Lindo, as next of kin of David Lindo, or otherwise howsoever: and Abraham Lindo covenanted with Moses da Costa Lindo to contribute towards the liquidation of the debts, &c., of David Lindo, and of the said three several bills of *exchange, the sum of 384*l.* 2*s.*: and Moses da Costa [*500] Lindo, in consideration of the release thereinbefore contained on the part of Moses Lindo, and of the covenant, &c., of Abraham Lindo, covenanted with Moses Lindo and Abraham Lindo, that he would, by means of the assets of David Lindo come to his hands as administrator as aforesaid, and of the sum of 384*l.* 2*s.* so agreed to be paid and contributed by Abraham Lindo, and as to the residue, by and out of his own moneys, pay the said three several bills of exchange when due, and all other the just and lawful debts of David Lindo, and his funeral and testamentary expenses; and it was thereby provided, that Moses da Costa Lindo should not be compelled to pay any claims in respect of any speculations in the funds, or any other species of gambling prohibited by statute.

The three bills of exchange were duly paid by Moses da Costa Lindo.

In January, 1837, upon the death of David Lindo's mother, a sum of 1333*l.* 6*s.* 8*d.* 3 per cent. consols fell in to the estate of David Lindo, and which his administrator became entitled to receive.

This bill was filed for the administration of the estate of Moses Lindo who had died, and it raised the question whether, under the general terms of the release of 1820, Moses da Costa Lindo was entitled to retain this 1333*l.* 6*s.* 8*d.* stock for his own benefit, or held it in trust for the next of kin of David Lindo; and all parties, waiving the objection of form, concurred in having the question now decided.

Mr. *Pemberton* and Mr. *L. Lowndes*, for the plaintiff, contended, that the sum of 1333*l.* 6*s.* 8*d.* consols belonged to the next of kin of David Lindo and now formed part of the estate of Moses Lindo; that although the release itself was general and unlimited in its terms, *yet its gener- [*501] ality must be restrained by the recitals and the context, so as to effectuate the manifest intention of the parties; *Ramsden v. Hylton*; (a) and that its operation must be limited to that portion of David Lindo's estate which was recited to be *all* his assets. That the condition of the release was that Moses da Costa Lindo and Abraham Lindo should each contribute a certain sum towards the payment of these disputed bills, and that the consideration would altogether fail, if Moses da Costa Lindo were allowed to repay himself out of the assets of the intestate; this would be a fraud upon Moses Lindo and Abraham Lindo, who had contributed their portions on the faith of Moses da Costa Lindo, personally, making a similar sacrifice. They also cited *Brown v. Meredith*. (b)

Mr. *Kindersley*, Mr. *W. C. L. Keene*, and Mr. *F. Goldsmid* for defendants in the same interest, contended, that it clearly appeared to have been

(a) 2 Ves. sen. 309.

(b) 2 Keen, 527.

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the intention of Moses Lindo not to relinquish the whole of the surplus of David's estate to Moses da Costa Lindo, but the particular portion only; and that he contributed the sum of 533*l.* as an act of gratuitous liberality, and not for a compromise of his rights as sole next of kin of the intestate.

Mr. *G. Richards* and Mr. *Heathfield*, contra, contended, that by the operation of the deed of the 17th of March, 1820, Moses da Costa Lindo became entitled, beneficially, to all the estate whatever of David; or at least that he was entitled to recoup himself the moneys paid by him in discharge of the bills; that it was true that a party could not recover back moneys lent for the purposes of settling losses on illegal stock-jobbing transactions; [*502] *Cannan v. Bryce*; (a) but then it must be "shown, that the lender was aware that the money lent was to be so applied; that in this case it did not appear that Daniel Mocatta had any knowledge that the money was to be applied in paying stock differences; and in such case, the bills would be valid, and their amount would be recoverable against the estate of the intestate; that the deed recited, expressly, an agreement that Moses Lindo should "relinquish all claims to any residue or surplus of the estate and effects of David Lindo," and that he expressly remised and released to Moses da Costa Lindo, "all his right and interest, property, benefit, claim and demand of, in or to the personal estate and effects of David Lindo," which clearly included the sum in question; that in consideration of this, Moses da Costa Lindo covenanted to pay, not only the three bills of exchange, but "all other the just and lawful debts of David Lindo, and his funeral and testamentary expenses;" and this also evidently showed, that Moses da Costa Lindo was to receive any assets which might come in, and was to take upon himself the payment of any other debts which might appear to be due from the estate; that by the deed, all parties agreed "to waive all questions respecting the validity of such bills of exchange, and the consideration thereof;" and that, therefore, all parties were now precluded from raising any question as to their validity. They also relied on the entry signed by Moses Lindo in the books of Lindo & Co.

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS:—The question in this case depends on the construction which ought to be given to the deed of the 17th of March, 1820. The deed was executed under the following circumstances:—It appears that David Lindo was a son of Moses Lindo, the testator in the cause: he was engaged in partnership with his brother Abraham Lindo and [*503] with the defendant Moses da Costa Lindo, and he died intestate in August, 1819. Letters of administration of his estate were granted to Moses da Costa Lindo, on the renunciation of Moses Lindo, his father and sole next of kin. At the time of his death he was indebted, or supposed to be indebted, to Daniel Mocatta in the sum of 1687*l.* 10*s.* and for the payment

(a) 3 Barn. & Ald. 179.

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of that debt Moses da Costa Lindo was, or was intended to be, surety. Moses da Costa Lindo possessed what was supposed to be the whole of the personal estate of David Lindo; and it appeared that after paying all other claims on the estate of David Lindo, a balance or sum of 458*l.* 7*s.* 8*d.* as was stated at one time, or 533*l.* 7*s.* 8*d.* as was stated at another time, would have remained in the hands of Moses da Costa Lindo, as administrator and surety, or supposed surety. If it was really a valid and subsisting debt which was due to Daniel Mocatta, the balance remaining in the hands of the administrator would have been insufficient to pay it; if, on the other hand, it was not a legal debt and could not be enforced, in that case the balance of 458*l.* 7*s.* 8*d.* or 533*l.* 7*s.* 8*d.* belonged to the testator in the cause as the father and sole next of kin of his son David Lindo. An account appears to have been rendered by Moses da Costa Lindo to Moses Lindo, in which account the amount of that debt of 1687*l.* 10*s.* was brought in, as a sum with which the estate of David Lindo ought to be charged; and in consequence of that sum being brought into the account, the estate of David Lindo appeared to be deficient for the payment of his debts to an amount exceeding 1000*l.* This account being rendered to Moses Lindo, he objected to that item in it which consisted of this debt of 1687*l.* 10*s.* and insisted that this was not a legal claim, because it was stated to have arisen out of illegal stock transactions. The circumstances under which the deed was executed are now approaching. It is alleged, on the part of the plaintiffs in this case, that Moses Lindo entirely objected to this debt, and said, "It is illegal, *and [*504] the estate of David ought not to be charged with it at all, and I, as his next of kin, am entitled to be totally exempted from it; nevertheless, as his father, I am interested in his reputation although he is dead, and you, his administrator and surety or supposed surety, and moreover your partner Abraham my son and David's brother, are all interested in the reputation of David; and although I do not allow that the balance should be applied in the payment of this debt which cannot be recovered, yet, for the sake of preserving the honor of David, I will contribute toward the payment, if you will take the payment of it on yourselves." This is the allegation of the plaintiffs; and it appears from the books and accounts, that though the alleged sum of 1687*l.* 10*s.* had been brought into the accounts of the estate of David Lindo, yet a subsequent account was made out in which it was altogether omitted, and by which it appeared, therefore, that the estate of David Lindo, instead of being deficient, left a surplus balance of 458*l.* 7*s.* 8*d.*, which was afterwards increased to 533*l.* 7*s.* 8*d.*; and it appears by the partnership books of David Lindo and Moses da Costa Lindo, that the whole amount of these bills was brought into the accounts of the partnership, as losses to which the partnership was liable by the transaction. It further appears, from the books in which a balance of 458*l.* 7*s.* 8*d.* appeared in favor of Moses Lindo, that that sum was carried to the credit of the account of Moses Lindo, and was afterwards carried to his debit, as given to the partners for the purpose of paying the

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debt of 1687*l.* 10*s.* Cotemporary with this transaction there is an entry in the books which shows that there was such an arrangement as I have referred to; it is dated the 6th of March, 1820; it is stated that it had been disapproved of by Moses da Costa Lindo, but it remained uncanceled, unobliterated and in no way impeached in the books of the partnership in [*505] which Moses da Costa Lindo was a partner, from the year 1820, up to the present time. This entry had been made on the 6th of March, and on the 17th the deed now in question was executed. By that deed it is recited, that *all* the outstanding funds, property and effects of David Lindo had been collected, received and converted into money, (his Lordship read the recital;) and it is again repeated, that the assets in the hands of Moses da Costa Lindo, which “were all the assets,” were more than sufficient to pay by 533*l.* 7*s.* 8*d.*

The first witnessing part of the deed says, that these parties had agreed to raise a fund for the payment and discharge of all the debts, &c. Now all the funeral and testamentary expenses and all the debts, except the debt in question, had been paid before or there were the means of paying them, and, therefore, this really means no more than that they were to raise a fund for the payment of that debt. [His Lordship read the witnessing part of the deed.]

This deed recites the circumstances, with sufficient distinctness, under which these transactions took place, and contains a general release of all the assets; and these bills have been paid, according to the arrangement. Some time afterward great additional assets were received, namely, 1333*l.* 6*s.* 8*d.* which is the sum in question in this cause. Now it is that the question arises between these parties, it being alleged by the plaintiffs, that the deed is to operate only to the intent, and with regard to the circumstances as existing at the time of making the deed; and it being alleged by the defendants, that it is to operate with a different intent, and to an extent which was not and could not be in the contemplation of the parties at the time. What is alleged on the part of Moses da Costa Lindo is, that whatever might be the amount of the assets received subsequently to the execution [*506] of this deed, the whole by the operation of this deed belonged to him for his own absolute use and benefit; that the deed made them his; and that he has a right to any thing which might have accrued to the estate of David Lindo, after the execution of the deed. In order to maintain that proposition, he must maintain that these general words in the deed cannot be restrained by the consideration of any circumstance, or any intention which prevailed at the time the deed was executed—he must necessarily say, that the general words are such, that he is entitled to the benefit of them, although it may appear from the nature of the transaction and the recitals in the deed, that no such effect was ever contemplated by any of the parties at the time. Now I apprehend that such is not the rule of this court, nor the effect of the case cited. It has been considered that the general words of a release are to be restrained by the contract and intention of the parties, that

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contract and intention appearing by the deed itself or from any other proper evidence that may be adduced upon the occasion.[1] Moses da Costa Lindo says, I am the legal personal representative: in the character of legal personal representative I am receiving assets, those assets I desire to apply in satisfaction of a debt of the intestate which I myself have paid. Now that, no doubt, independently of any deed, constitutes a very strong ground of claim; we must, however, look carefully to the circumstances. Moses da Costa Lindo, the legal personal representative, was dealing with the sole next of kin, who was entitled to the surplus; he enters into a contract with him; the sole next of kin says, "I am not liable to pay at all." The court has no occasion to enter into the question, whether there was a legal demand or not, it is sufficient to say, that the parties themselves considered it to be a matter of doubt whether that was a legal claim upon the estate or not, and so they have stated it in the deed; considering it to be a matter of doubt, they agreed "amongst themselves, that it [507] should be satisfied in a particular mode, which was by applying the assets which existed at that time, together with other sums of money to be contributed by Abraham Lindo and Moses da Costa Lindo; they agreed to raise a fund for the purpose, they did raise it, and that fund is applied. In consequence of this agreement the item is struck out of the account; can it be said that this item was under any circumstances afterwards to be brought into the account again? The claim is not so made, because Moses da Costa Lindo now desires to have the whole of the assets; but I do not think he can maintain his claim in this way. I have to consider what is the effect of this deed, and I am of opinion, that upon this deed, the assets which were intended to be released, were those assets, which the parties had regard to at the time when the deed was executed, that is to say, the sum which was supposed to be sufficient to pay all the other debts, viz. this sum of 533*l.* 7*s.* 8*d.*, which at that time Moses Lindo agreed to contribute. It is said, and I think it is said with a great deal of probability, that if the assets at this time had been sufficient for the payment of this sum, Moses Lindo might have said, "I will not take any thing from my son's estate till his whole debts are paid." That is not what is stated here—there is not a word in the deed, nor is there anything in the generality of the words which induces me to think, that he intended to release any other than those particular assets. There are some words which appear to imply something more, and those words I think are capable of being explained in this way:—the debts were supposed to be ascertained, but it was very possible that other claims might have been made.

[1] "The doctrine on this subject would seem to be, that a release is to be construed according to the intent and object of it, and that intent will control and limit its operation." Kent, Ch. *Kirby v. Taylor*, 6 Johns. Ch. Rep. 252. As where a joint and several bond was executed by three guardians, and by T. as their surety, and the ward, on arriving at age, released one of the guardians, but expressly reserving her rights as to the others, the release was held to operate only as to the one named in it, and as to the surety, so far only as he was surety for him, but not as to the other two. *Ibid.*

1838.—In the matter of the Heanor Friendly Society.

Now if other claims had been made against the assets, what would have been the defence of Moses da Costa Lindo? "I have paid the balance to Moses Lindo." This would not have been a defence to the claim of a creditor—he could not have defended himself against a creditor on the ground that he duly applied the assets, by saying he had paid them to the next of kin. He might have had a right against Moses Lindo to get that sum back again, and there are many words in this deed which might have created some question, and which I think are applicable to that state of things.

The nature of the transaction was this: the surplus was to be paid to Moses Lindo, and he was to contribute that amount towards payment of the debt which he thought illegal; in this arrangement all the other parties concurred; and on the whole, I think that the effect of the deed was to release those assets only which were specified in the deed.[1]

The counsel for the defendant being asked by the court whether they wished for an inquiry, declined proposing any.

IN THE MATTER OF THE HEANOR FRIENDLY SOCIETY.

1838: December 21, 22.

An officer of a friendly society, entrusted with moneys of the society jointly with another person, who is a member, but not an officer of the society, is not within the summary remedy provided by the eighth section of the act 33 G. 3, c. 54.

The stewards of a friendly society who were, in fact, but not in name, trustees of the society, allowed to petition under that act by the description of trustees.

THIS was a petition presented by Matthew Wood and Benjamin Jackson, as trustees of a friendly society, which was established at Heanor in Derbyshire, before the passing of the act 33 G. 3, c. 54, and which, not having conformed to the provisions of subsequent acts of Parliament, was still entitled to the benefit of that act.(a) The petition was presented under the 8th section of the 33 G. 3, c. 54,(b) for the purpose of making

[1] "If the operative part of a deed be doubtfully expressed, there the recital may be safely referred to, as a key to the intention of the parties; but where the operative part of the deed uses language which admits of no doubt, it cannot be controlled by the recital." Leach, *M. R. Bailey v. Lloyd*, 5 Russ. 344.

(a) See the acts 35 G. 3, c. 111; 49 G. 3, c. 125; 10 G. 4, c. 56; 2 W. 4, c. 37; and 4 and 5 W. 4, c. 40, s. 14.

(b) The eighth section of the 33 G. 3, c. 54, is in the following words:—"Provided always, and be it further enacted by the authority aforesaid, that the treasurer or treasurers, trustee or trustees for the time being, and all other officers of any such society, who shall have or receive any part of the moneys, effects, or funds of such society, or shall, in any manner, have been, or shall be, entrusted with the disposition, management, or custody thereof, or of any securities relating to the same, his, her, and their executors, administrators, and assigns respectively, shall, upon demand

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the respondent, Thomas Heath, who was alleged to have been the treasurer of the society, account for certain sums of money, with which, it was said, he had been entrusted.

*The society had no such officers as trustees, *nominatim*. The [*510] petitioners were called stewards, and the petition, as presented, purported to be the petition of the petitioners as stewards, alleging that the stewards of the society were, in fact, the trustees; the Master of the Rolls, however, considered that he could not entertain the petition unless it purported to be the petition of the trustees. His Lordship having given leave to amend, the designation of trustees was substituted for that of stewards, and, being satisfied by the affidavits, that the stewards were in fact, although not in name, the trustees, his Lordship allowed the petition to proceed.

The society held all its meetings at a public house, of which the respondent, Heath, was for some time the landlord. It was one of the society's printed rules that the landlord for the time being should be an honorary member, and should be entrusted, to a certain extent, with the society's property. Heath, in this respect, acted as his predecessors had done; but in addition to his duty as prescribed by the society's rules, it happened that a sum of 100*l.*, belonging to the society and not required for their immediate wants, was, by their direction, deposited in a banking house at Derby, in the joint names of Heath and a member of the society, named Thomas Whiteman, and to them jointly the bankers gave an accountable receipt for the amount. Twenty pounds, part of this sum of 100*l.*, were afterwards duly drawn out for the purposes of the society, but it was now alleged that the remaining 80*l.* had been misapplied by Heath, or with his concurrence, and the present petition was presented for the purpose of obliging him to make it good. Whiteman, however, could not be joined with him as a respondent to the petition, inasmuch as he was not an officer of the society, and *there- [*511] fore not within the terms of the act of Parliament by which the summary remedy was given.

made, in pursuance of any order by such society or committee to be appointed as aforesaid for that purpose, give in his or their account or accounts, at a general meeting of any such society, or to such committee thereof as aforesaid, to be examined and allowed or disallowed, and shall, on the like demand, pay over all the moneys remaining in his or their hands, and assign and transfer or deliver all securities, effects, or funds taken or standing in his or their name or names as aforesaid, or being in his or their hands or custody, to the treasurer or treasurers, or trustee or trustees for the time being, or to such person or persons as such society shall appoint; and in case of any neglect or refusal to deliver such account or to pay over such moneys, or to assign, transfer, or deliver such securities or funds in manner aforesaid, it shall and may be lawful to and for every such society, in the name of the treasurer or treasurers, trustee or trustees thereof, as the case may be, to exhibit a petition in the High Court of Chancery, or the Court of Exchequer in England, or the Court of Session in Scotland, or the Courts of Great Sessions in Wales respectively, who shall and may proceed thereupon in a summary way, and make such order therein upon hearing all parties concerned as to such court, in their discretion, shall seem just; and all assignments and transfers made in pursuance of such order shall be good and effectual in law to all intents and purposes whatsoever."

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A question was raised upon the evidence, as to whether Heath could be considered as the treasurer or an officer of the society ; but the Master of the Rolls was of opinion that he must be considered, at all events, an officer, if not the treasurer of the society. There was considerable conflict of testimony upon the merits of the case ; Heath alleging that the 80*l.* in question had been applied under the authority and for the purposes of the society, and the petitioners denying that any such authority had been given, or that any such application had taken place, and stating, that having discovered that a particular person had, by some unlawful means, received 24*l.*, part of the 80*l.*, the society had obliged that person to give his promissory note for the amount, as the only security which could be obtained, but a security which was said to be in fact worthless.

Mr. *Craig*, for the petitioners, cited *Ex parte Ashley*,^(a) and *Ex parte Ross*.^(b)

Mr. *Pemberton*, for the respondent.

THE MASTER OF THE ROLLS, at the conclusion of the argument, said he considered that Heath had been, during the time in question, an officer of the society, and that he had been apers on entrusted with moneys of the society ; that such moneys had been misapplied by him or through his instrumentality ; and that if the case were clearly within the terms by which the summary jurisdiction was given, Heath ought to be ordered to make good the whole amount, after deducting the 24*l.*, as to which the society had, in his [*512] Lordship's opinion, discharged him by taking the promissory note before mentioned ; his Lordship however said, he had considerable doubt whether any order could be made, inasmuch as in the present instance Heath had been entrusted jointly with another person, who was not before the court upon the present occasion, and could not be brought before it, in consequence of his not being amenable to the summary jurisdiction given by the act of Parliament. His Lordship said he would consider the case.

On a subsequent day, the Master of the Rolls stated that, upon further consideration, he was satisfied that the difficulty to which he had before alluded was insuperable, and that no order could be made.

Mr. *Pemberton* some time afterwards applied for Heath's costs, but the Master of the Rolls refused them.

(a) 6 Ves. 440.

(b) 6 Ves. 802.

1839.—Brooks v. Stuart.

Between GEORGE BROOKS, Plaintiff, *and* FRANCIS STUART, Defendant.

1839 : June 1.

The bill stated that the plaintiff, with the parol consent of the defendant, a surety, had by deed released the principal debtor, and that having brought an action at law against the surety, it had been held, that the surety was released. The bill prayed payment by the surety of the debt: Held, on demurrer, that the principal debtor was a necessary party to the suit.

THIS case came before the court upon general demurrer, and according to the allegations of the bill, one John Agar being indebted to a joint stock bank, he and the defendant, Stuart, as his surety, on the 5th of July, 1836, gave the bank their joint and "several promissory note for 100*l.*, [*513] payable on demand. That the plaintiff "by due endorsement thereof and otherwise" had become entitled to receive the value thereof. That by an indenture of the 15th of June, 1837, Agar conveyed his property to trustees for the benefit of his creditors, the surplus, if any, being reserved to Agar. That the creditors who executed the deed thereby released him and his estate from their respective debts, and all actions, &c., on account thereof.

The bill then stated, that after the indenture had been executed by Agar, application was made on behalf of himself and his creditors, to Edward Watson, the manager of the banking company, to execute the indenture of assignment, to release Agar from the debt due from him to the banking company, and to signify the assent of the company to accept the provision made for the payment of his debts by the indenture ; but the manager refused to execute or sign the same till he had obtained the consent of the defendant, Stuart, that he should sign it without prejudice to the security aforesaid, or to the liability of Stuart, as surety, to pay to the banking company the promissory note for 100*l.*, notwithstanding the manager should, by signing such indenture, release Agar from all claims and demands on him personally, in respect of the debt so due to the banking company, or on the promissory note, as one of the makers thereof ; and the manager, acting on this precaution and intention, on the 30th of June, 1837, wrote the following letter to the defendant Stuart :—

"You are doubtless aware that Mr. John Agar, of this place, the party whom you are a surety for to the above company, has lately made an assignment for the benefit of his creditors ; the company will concur in the assignment for the balance due to them, if you consent "that they [*514] should do so ; you will please to signify the same in writing, and then we shall have to claim from you the balance less the dividend received from Agar's estate." That a few days afterwards, and on or about the 11th of July, 1837, the defendant, Stuart, called at the bank and conversed with the manager on the subject of his letter, and he then said, alluding to Agar's insolvency and assignment, that it was a bad job ; and wished the manager to execute the assignment and receive the dividend, and he would pay the difference ; and the defendant then expressly authorized the manager to execute

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the assignment without prejudice to the defendant, Stuart's, continuing liability to pay the note for 100*l.* and interest, which he, Stuart, then and there promised to pay, notwithstanding the indenture which had been executed as agreed on, but he did not sign any writing; and thereupon the manager was instructed to execute the indenture of assignment, and he having full authority to release Agar personally from the payment of the debt, executed the same indenture accordingly. That the manager, though he was advised that a parol promise was sufficient, yet that it was better to have it in writing, and being desirous to have the said authority and consent of Stuart confirmed by writing, again wrote to Stuart for his written concurrence to prove against Agar's estate and to execute the indenture, or to this effect; and in reply to the last mentioned letter, he received a written promise from Stuart to pay the debt due on the promissory note, by letter written by Stuart, dated Hull, 29th July, 1837, and addressed to Edward Watson as the manager of the bank, without adverting to his promise made as aforesaid, but he promised to pay the 100*l.* in a few weeks, and the letter was as follows:—Sir, [*515] I shall feel much obliged if you can allow the surety to remain a few weeks longer, and I will pay the 100*l.* that I am bound for John Agar."

The bill then stated, that the manager, on the 17th of August, 1837, applied to Stuart for the 100*l.* he was surety for to the company, and that a few days afterwards he called, and was told that Edward Watson had signed the indenture of assignment executed by Agar for the benefit of his creditors; and Stuart otherwise knew and had been informed and believed that such indenture of assignment had been so executed; and thereupon Stuart expressed his approbation of what had been done, and on the morning of the last mentioned day, again promised to call in the afternoon, and pay 50*l.* in part of the said debt on the promissory note.

The bill then stated, "that no payment having been made by Stuart, the plaintiff caused him to be sued at common law for the sum of 100*l.* and interest; and in the pleadings at common law, the plaintiff alleged the promise to have been made as aforesaid; and the defendant, Stuart, did not deny, but he admitted by his pleading, that he authorized the execution of the indenture under the circumstances aforesaid, and that he made such promise as aforesaid: and he demurred to the plaintiff's claim at common law, and the demurrer was allowed from the insufficiency of the promise of Stuart, and the manner in which same was made, to enable said plaintiff to maintain his said action against the defendant at common law. And the plaintiff, for the reasons aforesaid, is remediless at common law, and the debt on said promissory note still remaining wholly due and unpaid, the plaintiff is compelled to file his bill in this honorable court for redress in the premises."

[*516] "The bill contained no allegation of fraud, and did not contain any offer to account for the dividends received under the creditor's

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deed. It prayed an account of what was due to the plaintiff by virtue of the promissory note, and for payment.

To this bill the defendant demurred, for that John Agar was not made a party; and secondly for want of equity.

Mr. *James Russell*, in support of the demurrer:—On this promissory note Agar is principal and Stuart surety, and relief is sought by this suit, not against the principal, but against the surety. If the plaintiff were to succeed against the defendant in this suit, the latter, as surety, would be entitled to be indemnified out of the funds of the principal; Agar is therefore a necessary party, in order that complete justice may be done, and that the rights of all parties may be settled in such a way as to prevent future litigation. In *Cockburne v. Thompson*,^(a) Lord Eldon says, "The strict rule is, that all persons materially interested in the subject matter of the suit, however numerous, ought to be parties, that there may be a complete decree between all parties having material interests;" and again he says,^(b) "The plaintiff suing upon a joint and several bond must bring forward all the obligors, principals and sureties." It is an established rule, that a creditor cannot come for relief against the surety behind the back of the principal debtor: and though it may be true that the plaintiff cannot have relief in this suit against Agar, still he is a necessary party.

*Secondly, with respect to the demurrer for want of equity. It has [⁵¹⁷] been decided that the defendant is discharged at common law, and the question is, whether any equitable circumstances are stated which show that the plaintiff is nevertheless entitled to relief in this court. If this were a case of fraud it might be so, but no fraud is alleged by the bill. The parties entered into a legal liability, and the plaintiff having resorted to a court of law, it has been decided that the defendant is released; then will this court introduce a new liability after the question has been settled at law? He cited *Ex parte Glendinning*. ^{c)}

Mr. *Pemberton* and Mr. *Wright*, in support of the bill. At law, it is true that the liability does not continue, for at law a deed cannot be affected by any instrument which is not under seal; *Cocks v. Nash*.^(d) It was on that ground that this case was decided at law, but this is not the doctrine of a court of equity. If the principal be released with the consent of the surety there is no fraud on the surety, for the creditor having a remedy against both, may, with the consent of one party, abandon his remedy against the other. Agar's liability has ceased, his character of principal has been destroyed by the dealing between the parties, and it is so shown on this record; the bill is right in form and substance, and Agar ought not, therefore, to be made a party.

They cited Nelson's Chancery Reports, 105, *Stanley v. Stock*,^(e) *Collins*

(a) 16 Ves. 825.

(d) 9 Bing. 341.

(b) Page 326.

(e) Moseley, 383.

(c) Buck. 517.

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v. Griffith,(a) Maddox v. Jackson,(b) Haywood v. Ovey,(c) Lee v. Lockhart.(d)

[*518] *Mr. Russell, in reply. The remedy against the surety was not reserved by the deed, and if so, then by releasing the principal debtor, the creditor has precluded himself from proceeding against the surety; *Ex parte Glendinning,(e)* As between plaintiff and Agar there is a release, and the plaintiff cannot aver that it was a release reserving his right against Stuart. *Lawson v. Right.(g)*

THE MASTER OF THE ROLLS:—This is a demurrer, for want of equity and also for want of parties, to a bill which prays [his Lordship read the prayer.] It appears that Stuart and Agar were jointly and severally liable on this promissory note. In June, 1827, Agar seems to have been in embarrassed circumstances, and by a deed dated 5th June, 1837, he conveyed all his property to trustees for the benefit of his creditors; and there was a provision, that in case there should remain any surplus of the said moneys and effects after payment of all costs and distributions as therein mentioned, then the same should be paid to Agar, his executors, administrators and assigns; and the creditors did absolutely remise, release, &c., Agar, his executors, &c., and his future lands, goods, &c., as well their and each of their respective debts, as also all and all manner of action and actions, suit and suits, &c., on account thereof." In this state of things the creditor was willing and desirous to go in under the deed, but he was aware he could not do this without peril to his rights against Stuart, and therefore he applied for his consent, expressing his willingness to execute the deed if Stuart would consent; after some negotiation an interview took place, when Stuart said it

"was a bad job, and wished him (the manager) to execute the assignment, receive the dividend, and he *would pay the difference."

[*519] [His Lordship stated the subsequent transactions.] Upon this an action was brought, and it appears that by the mode in which that action was carried on, the surety was held to be released, and it is said that he is released in equity. This is a joint and several promissory note, and the defendant being merely surety, the creditor could not deal with the principal debtor without the consent of the surety; but how is it here? the creditor applies to the surety for his consent, and he says, "Do you receive the dividends, and I will pay the difference;" so that after having prevailed on the creditor to do this, he turns round and says, "Now that you have done this, for my convenience, I am exonerated altogether." All this is stated on the bill, though it is not distinctly alleged as matter of fraud; but is it honest, after prevailing on the creditor to sign this deed, to say, I am now exonerated? On the other hand the plaintiff's claim is not quite honest, for the defendant promises to pay the difference, yet the demand in this bill is for the whole amount of the note. I have looked through the bill for an explanation on

(a) 2 P. Wms. 313.

(d) 3 Myl. & Cr. 302.

(b) 3 A.k. 406.

(e) Buck. 517.

(c) 6 Mad 113.

(g) 1 Cox, 275.

1838.—Codrington v. Johnstone

this point, but do not find any. I should certainly hesitate much, before I allowed the demurrer for want of equity. With respect to the other point, conceiving that it is not perfectly clear that Agar may not be liable to contribute something to Stuart, it does appear to me that Agar is a necessary party. I must allow the demurrer for want of parties, and give the plaintiff leave to amend by adding parties.

Demurrer allowed for want of parties.

*CODRINGTON v. JOHNSTONE.

[*520]

1838: November 6.

At the instance of a mortgagee of a West India estate, a receiver and manager had been appointed:

Held that he was not entitled to the produce of crops severed and shipped to the consignee of the mortgagor prior to the appointment, although there had been no conversion prior to that time.

A receiver when appointed by the court, is entitled to receive rents then in arrear.

THE plaintiff, Sir Christopher Bethell Codrington, was entitled to a very old mortgage on a West India estate belonging to the defendant, Sir Frederick Johnstone. On the 6th of August, 1838, an order was made by which it was referred to the Master, "to appoint one or more person or persons in the Island of Grenada, to manage the estate comprised in the mortgage in the pleadings, and to receive the rents, profits and proceeds thereof, with a direction to remit the same to a proper person in London, to be approved of by the Master for that purpose;" with the usual directions as to passing accounts and payment of the balances into court: and it was ordered that Sir Frederick Johnstone and Mr. Ure should deliver up possession of the plantation, &c., to the manager.

The plaintiff now presented a petition which stated that certain proceeds of the plantation were lately in the course of consignment to Messrs. Ellice & Kinnear, who had been hitherto the consignees of the proceeds thereof, and that the proceeds so consigned were now in the hands of the said Messrs. Ellice & Kinnear to be disposed of by them; that after payment of the charges in respect thereof, there was remaining a considerable surplus of the moneys to arise from the sales of such proceeds; that the petitioner was advised that such surplus ought not to be paid to the defendants Sir Frederick Johnstone and Mr. Ure, but ought to be paid into court, and appropriated, *together with the clear proceeds of the future consignments [*521] from the said plantation, for the security of the petitioner, as mortgagee thereof.

The petition prayed that Messrs. Ellice & Kinnear might be ordered to pay into court "the clear surplus, after payment of the charges aforesaid, of the proceeds to arise from the sale of the proceeds of the plantation consigned to them, the amount to be verified by affidavit; and for an injunction to restrain Sir Frederick Johnstone and Mr. Ure from receiving the money to arise from the sale of the said proceeds, or any part thereof.

1839.—Codrington v. Johnstone.

From the affidavit filed on behalf of Messrs. Ellice & Kinnear it appeared, that they had, for some time past, acted as consignees of the produce of the plantation, and had made advances for the stores necessary for the estate, which had been shipped from this country; and that they had taken up bills for the island supplies, and had from time to time made advances to Sir F. Johnstone. That such several advances had been made on the faith of the produce of the plantation being remitted to them, and that such produce had accordingly been remitted to them, and they had sold and disposed thereof, and had credited the estate with the proceeds, and debited the same with the various advances made by them. That on the 1st of January, 1838, a sum of 5400*l.* was due to them in respect of such advances after giving credit for the proceeds of the produce, since which time they had made various payments and advances amounting to 1397*l.*, part of which had been advanced for the purposes of the present crop, and without which the crop could not have been got in and remitted to this country.

[*522] *That on the 7th of June, the 17th of July, the 1st of August and the 7th of September respectively, they had received bills of lading of the produce shipped, all of which were written and sent by the agent before the order for a receiver of the 6th of August.

Mr. *Pemberton* and Mr. *Wilbraham*, in support of the petition, contended, that though a mortgagee out of possession was not entitled, as against the mortgagor, to an account of by-gone rents, yet, that immediately on his giving notice or taking possession, he was entitled to receive not only the future rents, but also those in arrear; so where a receiver was appointed over an estate, he was entitled to receive all the unpaid rents and all the unconverted produce; that in this case, therefore, the receiver was entitled to so much of the sugars, &c., as had not been converted and was in *in transitu* at the time of making the order of the 6th of August; they contended, that the mere remittance of the produce to an agent of the mortgagor did not interfere with the legal right of the mortgagee to receive it.

Mr. *Tinney* and Mr. *Koe*, for the defendants. The crops were severed prior to the order for a receiver, and have been received by the agent of the mortgagor, which is the same as if the mortgagor himself had received them. Lord Eldon lays it down distinctly, "that a mortgagee never can in this court make the mortgagor account for rents for the time past." *Ex parte Wilson*. (a) The consignee, therefore, is entitled to retain the produce on the faith of which he has made advances.

Mr. *Richards*, for Messrs. Ellice & Kinnear, contended, in addition to the above argument, that as they were not parties to the suit, the [*523] court had no jurisdiction on *petition to take from them the produce separated from the estate prior to the order of the 6th of August.

Mr. *Pemberton*, in reply. A receiver having been appointed, the court has

(a) 2 Ves. & B. 252.

1838.—Codrington v. Johnstone.

jurisdiction to prevent any party from interfering with the full performance of his duties. The question is, whether the moneys to be received from the sale of the produce of this estate do not stand in the same situation as unreceived rents. If a receiver had been appointed of an estate in England, he would have undoubtedly been entitled to demand all the rents then unreceived. The estate was the estate of the mortgagee, and the moment he gave notice, he was entitled to the whole rents or produce. The question in *Ex parte Wilson(a)* was, whether the mortgagor had received the rents *for the mortgagee*: here there is no such question, for the rent is in the hands of a third party. Suppose rent were payable in kind, and were stopped in its passage to the mortgagor, would not the mortgagee after notice, or the receiver in the cause, be entitled to claim it? Here it is clear that the rent or produce has never reached the pocket of the mortgagor, but is stopped by an adverse claim for a lien, as to which the right of the mortgagee is paramount.

THE MASTER OF THE ROLLS [after stating the order of the 6th of August for a manager and consignee and the prayer of the petition.]

The "clear surplus" which is asked to be paid into court is the clear surplus which was grown, and as it is said, severed, previous to the date of the order, for a manager; but though grown and severed previous to the date of the order, it does not appear to have been converted before [*524] that time; but the bills of lading, as I collect from the affidavit, had been signed previous to the 6th of August.

The question is, whether under an order for a manager, with a direction for him to receive and remit the rents and produce, that produce is comprised which had already been severed and sent away to the person appointed consignee by the mortgagor, but which had not, at the time of making the order, been received by the consignee or mortgagor. Nothing is now more clear than that a mortgagee is not, as against the mortgagor, entitled to an account of by-gone rents;[1] and it is also clear that a receiver, when appointed by this court, is entitled to all the rents then in arrear, and the present case is said to be like the case to which I last alluded, and Messrs. Ellice & Kinnear are likened to the tenants of the estate, but I have great difficulty in perceiving the analogy. Here the mortgagor was in possession of a West

(a) 2 Ves. & B. 252.

[1] Where the mortgagee has neglected to take a specific pledge of the rents and profits of the mortgaged premises, for the security of his debt, before it becomes due, he has no equitable right to the rents and profits in the mean time; and in case of the death of the mortgagor, his judgment creditors are entitled to a preference in payment out of such rents and profits. *Bank of Ogdensburg v. Arnold*, 5 Paige, 38. Nor has he any legal or equitable right to compel a junior mortgagee in possession, or an owner of the equity of redemption, who is not personally liable to pay the prior mortgage, to refund any part of the rents and profits which were received by such junior mortgagee, or owner, before such prior mortgagee attempted to acquire a specific lien upon the rents and profits of the mortgaged premises by the appointment of a receiver. *Howell v. Ripley*, 10 Paige, 43.

 1839.—*Darke v. Martyn*.

India estate, had the full control and management of it, and was dealing with it as his own at the time the order was made; he had severed the produce and sent it to his consignees in England, subject to their claim for advances made for the purposes of the estate, and also to other claims which he had created by contract with them, he having received advances of money from the consignees, on the understanding that they should repay themselves out of the consignments. It is clear that their right could not extend further than the right of Sir Frederick Johnstone, and that when his right was intercepted by the mortgagee, their right became intercepted also; but under the circumstances stated, I do not think I can make any order on this petition. It must therefore be dismissed, and with costs as against Messrs. Ellice & Kinnear.

[*525]

**DARKE v. MARTYN*.

1839; June 17.

A testator died in March, 1823, and in January, 1824, and January, 1825, the executors and trustees deposited part of the assets in the hands of bankers, on their notes carrying interest; the bankers failed in November, 1825, and no necessity having been shown for such deposit, the trustees were held personally responsible for the loss.

THE infant plaintiffs, were entitled to the residuary estate of the testator, who died in March, 1823. Shortly after the testator's death, his will was proved by the defendant, Mr. Martyn, and the testator's widow, who had been appointed "executors in trust to direct the due execution thereof."

The executor and executrix opened an account, as executors of the testator, with Messrs. Elford & Co., who were country bankers, and in the months of January, 1824, and January, 1825, respectively, they paid into the bank two sums of 956*l.* and 209*l.*, part of the testator's assets, and took two bankers' notes, carrying interest, for the amount. These sums were lent distinct from other moneys paid in by them to the bankers, and did not form part of the general account current.

Messrs. Elford & Co., became bankrupts in November, 1825, and the two sums of 956*l.* and 209*l.* became thereby lost. The bill, amongst other breaches of trust sought to charge Mr. Martyn, personally, and the estate of the executrix with the loss of these two sums.

The answer did not suggest any reason or necessity for depositing these sums with the bankers in the manner stated.

Mr. *Pemberton* and Mr. *Stratton*, for the plaintiffs, contended that [*526] the executors were liable to make good *the loss of the fund which had been improperly invested on personal security.

Mr. *Kindersley*, and Mr. *Wright*, for the representative defendant Martyn :

1839.—Garland v. Littlewood.

—There is no decision which goes to this extent, that executors are liable, for moneys placed for a time for safe custody in the hands of a banker: here the money was deposited for the purposes of the trust of the will; there was no permanent investment of the money upon the security of the bankers, but the notes were taken for the purpose of preventing the money remaining unproductive, and for the benefit of the parties beneficially entitled: there was nothing improvident in this course: it is the usual practice with country bankers and their customers. The trustees ought not to be visited with the consequence of this loss, which was involuntary; it not being shown that there was any wilful default, or that the trustees acted improvidently.

Mr. *G. Richards* and Mr. *Kinglake*, for the representatives of Mrs. Darke who had died pending the suit.

Mr. *Tinney*, Mr. *Tennant* and Mr. *Koe*, for other parties.

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS:—With respect to these sums of 956*l.* and 209*l.*, I have no doubt: if the executors had stated in their answer that it was necessary for the purposes of the will to have a balance in hand, and that they had kept these sums in the hands of the bankers, it would be a subject of *excuse; [1] but as I understand the facts, they are quite [*527] inconsistent with such a statement; for the debts and all the pecuniary legacies seem to have been paid very shortly after the death of the testator; 956*l.* was given to the bankers on a security on which they were to pay interest, and the same appears to have been done as to 209*l.* These sums were improperly lent on the personal security of the bankers; the trustees, therefore, became answerable. It is to be regretted that Mr. Martyn should have given way to what he thought the wish and interest of the family, and thus have rendered himself responsible; but acting in the character of executor, I am opinion that his estate and the estate of Mrs. Darke are liable to make good these sums.(a) [2]

GARLAND v. LITTLEWOOD.

1839: June 19.

A case was alleged on the pleading to charge executors for what they might, but for their wilful default, &c., have received; at the hearing the common accounts only were directed against them: the case coming on for further directions, on the Master's report: Held, that the executors could not be charged as for their wilful default, &c., and that no inquiry could then be directed on the subject, although the Master's report laid a foundation for such an inquiry.

THIS bill was filed by the residuary legatees under a will against the executors: the bill contained specific charges against the defendants as to their

(a) See *Moyle v. Moyle*, 2 Russ. & M. 710.

[1] Vide *France v. Woods*, Taml. 172.

[2] Vide *Cocker v. Quayle*, 1 Russ. & M. 535. *Bacon v. Clark*, 3 M. & Cr. 294. *Pride v. Fooks*, 2 Beav. 530. *Munch v. Cockerell*, 9 Sim. 339. Trustees investing trust money on an unauthorized security, are responsible for any future loss traceable to that first error. *Fyler v. Fyler*, 3 Beav. 550.

1839.—*Garland v. Littlewood.*

not possessing the testator's estate, and it prayed for an account of the personal estate received by or by the order &c. of the executors, or which they might have received without wilful neglect or default. The decree directed merely an account of what had been received by or by the order of the executors, and how the testator's property which had been invested had been applied and disposed of.

[*528] *On the Master's report it appeared, (as was contended,) that the executors might, but for their wilful neglect or default, have possessed themselves of the testator's stock in trade, furniture, &c., but that instead of so doing they had suffered it to remain in the possession of his widow, who had since become insolvent.

The cause now came on, on further directions, when

Mr. *Kindersley* and Mr. *Simons*, for the plaintiffs, contended, that although the decree did not direct an account of what the executors might have received without their wilful neglect, &c., yet as it appeared on the report that they might have possessed the stock in trade, &c., the court ought to charge them with the value thereof, or, at all events, ought to refer it back to the Master to inquire and state the circumstances under which the stock in trade had been left in the widow's possession, with a view to the executors being charged with wilful neglect.

Mr. *Sidebottom* appeared for defendants in the same interest as the plaintiffs.

Mr. *Pemberton* and Mr. *Pigott*, for the executors, contra.

Mr. *G. Richards*, for another defendant.

THE MASTER OF THE ROLLS:—The plaintiffs in this case filed their bill seeking to charge the trustees with such parts of the testator's estate as they might have received but for their wilful default, and the prayer of the bill is in conformity therewith. At the hearing the plaintiffs obtain no [*529] *declaration or inquiry as to the wilful default of the defendants, the trustees, nor is there any reservation of any such point; on the contrary, the plaintiffs took only the common decree for an account, and the parties prepared and adduced their evidence accordingly in the Master's office; I think nothing could be more unjust than, whilst the parties were performing their duties under this decree, another case should be allowed to be made out against them: they would probably have proceeded differently in the Master's office if they had been aware that it was the object of the plaintiffs ultimately to charge them for their wilful default; I cannot therefore charge the trustees in the way asked by the plaintiffs, it would be a surprise upon them; neither do I think that I ought now to direct an inquiry as to what the trustees might, but for their default, have received, inasmuch as the propriety of such an inquiry was raised by the pleadings, and was before the court when the decree was made at the hearing; I cannot vary the decree so made, on the cause coming on for further directions.[1]

[1] "The examinations before the Master should be limited to such matters, within the limits of the order, as the principles of the decree or order may render necessary." Kent, Ch. *Remsen v.*

1839.—Vickers v. Cowell.

VICKERS v. COWELL.

1839 : July 18.

Where a mortgage is made to several persons jointly, they are, in equity, tenants in common of the mortgage money, and the representatives of such of them as may be dead are necessary parties with the survivor to a bill for foreclosure or redemption.

THIS was a mortgagee's suit, the object of which was to redeem the prior charges on a property in Yorkshire, and to foreclose the mortgagor and the incumbrancers subsequent in charge to the plaintiff. One of the mortgages stated in the bill, which was prior in point of date to the plaintiff's charge, but over which the plaintiff claimed a priority in consequence of its not having been registered previous to the registration of the plaintiff's mortgage, was a mortgage to Henry Greenwood and Christopher Bollond. [*530]

Christopher Bollond was dead, but his representatives were not made parties to the suit. The case came on, and

Mr. *Pemberton*, and Mr. *Beavan* objected, that the cause could not proceed in the absence of the representatives of Christopher Bollond; that although, at law, the debt and security survived to Henry Greenwood, yet in equity, Greenwood and Bollond were tenants in common; (a) and the representatives of Bollond had an interest in the mortgage money, and were necessary parties to the suit.

Mr. *G. Richards* and Mr. *Koe*, contra, contended that the representatives of Bollond were not necessary parties to the suit, and that the right to the money had survived to Greenwood; and secondly, they insisted, that it appeared from the mortgage deed itself, that the money was trust money, in which the representatives of Bollond, therefore, could have no interest, and that it was not necessary to make the *cestui que trusts* parties.

Mr. *Pemberton*, in reply. If no trust appears on the deed, then Bollond's representatives are necessary parties; on the other hand, if the trust appears, the parties beneficially entitled to the money must be before the court, otherwise the title obtained under the decree will be imperfect.

*Mr. *Kindersley* and Mr. *Rogers* appeared for Greenwood. [*531]

THE MASTER OF THE ROLLS held the objection to be valid, saying it had been well established, that where money was advanced by several persons jointly on a security, though the right to it survived at law, yet that the same rule did not prevail in equity. Here the money appeared advanced by the two, and there was nothing to show that the representatives of Bollond were not interested in it; the cause must therefore stand over, with liberty to amend by adding parties.

Remsen, 2 Johns. Ch. Rep. 501. And see *Twysford v. Trail*, 3 Myl. & Cr. 645, 650, n. 1. *Lichfield v. Baker*, 2 Beav. 481. *Hopkinson v. Bagster*, 1 Yo. & Coll. C. C. 13.

(a) *Coote on Mortgages*, 620.

 1839.—Powell v. Davies.

BROOK v. BROOK.

1839: July 10.

The court declined making an order allowing a feme sole to propose herself to be trustee, on the ground that on her marriage her husband might interfere with the trust.

In this case, new trustees were to be appointed,

Mr. *Stinton* asked that Miss B. might be at liberty to propose herself as trustee before the Master.

THE MASTER OF THE ROLLS declined, saying that it was not the usual practice, and it might lead to inconvenience in case of her marriage, when her husband would have the power of interfering with the trust.

[*532]

***POWELL v. DAVIES.**

1839: April 10, July 9, August 10.

A testator devised a freehold estate to A. for life, and after his death he devised the same to be equally divided into four parts, between one child of A., one child of B., one child of C. and one child of D., for them to receive the rents and divide the money between them; and it was his desire that his estate should never be sold out of the family; and provided A., B., C. and D. should never have any lawful children, the testator's desire was that their parts should go to their next of kin. At the time of making the will and of the death of the testator, B. only had a child, namely, a daughter, but after the testator's death B. had a son. At the death of A. there were children, both sons and daughters, of A., C. and D.: Held, first, that the gift to "one child" was not void for uncertainty; secondly, that the daughter of B., and the eldest child of A., C. and D. respectively, whether a son or daughter, who came into *esse* after the testator's death were entitled; and thirdly, that under the words, the fee passed.

In April, 1807, Francis Davies had four children, viz. Thomas Davies, Hannah, the wife of Samuel Beddoes, Anne Davies and Margaret Davies; and Hannah Beddoes had one child, Susannah, born on the 4th of March, 1803.

On the 7th of April, 1807, George Peate made his will, and thereby, after giving several legacies, gave and devised to Thomas Davies, the son of Francis Davies, all the testator's freehold estate during his life, and after the decease of Thomas Davies, gave and devised the same estate to be equally divided into four parts, between one child of Thomas Davies, one child of Samuel Beddoes, one child of Anne Davies and one child of Margaret Davies, for them to receive the rents and divide the money between them; and it was his desire that his estate should never be sold out of the family; "Provided the aforesaid Thomas Davies, Anne Davies and Margaret Davies should never have any lawful children, his desire was that their parts should go to the next of kin."

The testator died in May, 1807.

On the 7th of August, 1807, Thomas Davies married, and there was issue of the marriage several children, of whom the eldest was a daughter.

1839.—Powell v. Davies.

*On the 4th of February, 1808, Anne Davies married John Powell, [*533] and there were issue of the marriage several children, of whom the eldest was a son.

On the 1st of February, 1816, Margaret Davies married William Evans, she had issue two children, the eldest a son, the other a daughter.

Hannah Beddoes had four other children, a son and three daughters, born after the testator's death.

On the 25th of January, 1836, Thomas Davies died, and there were then living five children of Thomas Davies, the eldest a daughter, five children of Samuel Beddoes, the eldest a daughter, nine children of Anne Powell, the eldest a son, and two children of Margaret Evans, the eldest a son.

Mr. *Tinney*, and Mr. *Bethell*, for the plaintiffs, and Mr. *Stuart* and Mr. *Abraham* for parties in the same interest, contended that the one child of Samuel Beddoes was the child of Samuel Beddoes who was living at the date of the will and at the time of the testator's death; and that as to the children of Thomas Davies, Anne and Margaret, the one child was the first that came into *esse*; that in each case, the one child was the first born; that the eldest child of Samuel Beddoes immediately on the testator's death, and the eldest child of each of the others on coming into *esse*, acquired an absolute indefeasible interest in one-fourth of the estate.

Mr. *Pemberton* and Mr. *Dixon*, for the eldest son of Thomas Davies, who was the heir at law of the testator, contended, that in each case the devise to one child of a person, without specifying it by name, was void for uncertainty; and secondly that a son, though younger in age, was entitled in preference to his sister.

*The following authorities were cited:—*Loddington v. Kime*; (a) [*534] *Robinson v. Robinson*; (b) *Blackburn v. Stables*; (c) *Dowset v. Sweet*; (d) *Mellish v. Mellish*; (e) *Doe dem. Hayter v. Joinville*; (g) *Mohun v. Mohun*; (h) *Strode v. Russell*; (i) *Wild's case*; (k) *Bate v. Amherst*; (l) 1 Jarman's Pow. Devises, 365.

August 10.—THE MASTER OF THE ROLLS (after stating the circumstances of the case.) The only child of Francis Davies who had a child at the date of the will was Hannah the wife of Samuel Beddoes, and there being only one child of Samuel Beddoes, there is no gift over of the share given to the one child of Samuel Beddoes. This circumstance appears to indicate that the testator considered that that one child (who was a daughter) would take.

The three other children of Francis Davies were unmarried, and the gift over is in the event of their never having any lawful children. The gift

(a) 1 Salk. 224; and 1 Lord Raymond, 203.

(d) Ambler, 175.

(g) 3 East, 172.

(k) 6 Co. Rep. 27.

(b) 2 Ves. sen. 226.

(e) 2 Barn. & Cr. 520.

(h) 1 Swan. 201.

(l) Sir T. Raymond, 82.

(c) 2 V. & B. 367.

(i) 2 Vern. 621.

 1839.—*Kay v. Marshall.*

over, therefore, as to the share given to one child of each of those children, would not take effect, in the event of one child of each coming into *esse*.

And considering that here there is not a gift to one of several children, which would be uncertain, but a gift to one child of each of four persons; that as to one, the testator has himself indicated, that the only one in *esse* would take; that in the three other cases the will is so expressed, [*535] that the gift may vest immediately on the "coming into *esse* of the first child, and that thereupon the gift over would fail, I think that the devise ought not to be considered as void; and that the eldest of each of the four children of Francis Davies became and is entitled to an equal fourth share of the estate, and I think that under the words the fee passed.

KAY v. MARSHALL.

1839: May 22, 27, June 3, July 10.

Before the grant of the plaintiff's patent, the reach in spinning machines varied from less than an inch to thirty-six inches, according to the length of the fibre of the material. The plaintiff discovered a new and improved mode of preparing flax and other fibrous substances, in which process the fibre became shortened, and the length of the reach in spinning it was necessarily diminished. The plaintiff obtained a patent, *first*, for thus preparing the flax and other fibrous substances; and *secondly*, for spinning it at a shorter reach than had been done before, namely, at two inches and a half: Held, that the second part of the patent could not be supported, and that the patent was, therefore, invalid.

THE facts of the case are fully stated in the judgment of the Master of the Rolls, and the former proceedings in this case will be found reported in 1 Mylne & Cr. 373; 1 Keen, 190; and 5 Bingham's N. C. 492. The case was argued by

Sir F. Pollock, Mr. Kindersley, and Mr. Booth, for the plaintiff, and by Mr. Pemberton, Mr. Barber, and Mr. R. Atkinson, for the defendant.

July 10.—THE MASTER OF THE ROLLS:—This case came before me, on the equity reserved upon the certificate returned by the judges of the Court of Common Pleas, to whose consideration a case was submitted with the question, whether the plaintiff's patent was valid in point of law.

The judges have certified their opinion to be, that the patent is [*536] not valid in point of law, and the "defendants thereupon insist that, the plaintiff's bill ought to be dismissed with costs; and that the plaintiff ought also to pay the costs of the issue and of the case.

The plaintiff contends that the opinion of the judges is erroneous, and that I ought either to give relief, notwithstanding their certificate, or to put the question relating to the validity of the patent into some further course of inquiry.

The question with me is the same as that which was before the judges,

1839.—*Kay v. Marshall.*

and though I have the aid of their opinion, and, by their favor, of the reasons which induced them to form that opinion, it is undoubtedly my duty to consider, whether after hearing the reasons which have been advanced on both sides, it is an opinion satisfactory to my own mind, and such as I ought to adopt. The decision to be pronounced here, must rest on my responsibility, and not on the responsibility of the learned judges whose assistance I have asked and received.

The patent was granted for new and improved machinery, for preparing and spinning flax, hemp, and other fibrous substances, by power; and in the specification the plaintiff declares the nature of his invention to consist in new machinery for macerating flax and other similar fibrous substances, previously to drawing and spinning it; and also in improved machinery for spinning the same, after having been so prepared.

Nothing has occurred to show, that the plaintiff's machinery for macerating flax, previously to drawing and spinning it, was not new at the time when the patent was granted, and nothing has occurred to show, that previously to the grant it was known, that maceration to the extent proposed by the plaintiff, was not a "new process by which flax was [*537] usefully prepared for drawing and spinning it; and so far as relates to the maceration described in the patent, no question is made as to the novelty and utility of the plaintiff's invention; and if this were all, the validity of the patent would not be affected by the fact, that before the grant a mode of preparing the flax for spinning, by moistening it, had been invented by Horace Hall, or that, subsequently to the grant, a more convenient and efficient mode of maceration had been invented and come into general use. But with respect to the improved machinery for spinning, the plaintiff, in his specification, says, "I place the drawing rollers only two inches and a half from the retaining rollers, and this constitutes the principal improvement in the said spinning machinery: for the roving being so completely macerated, would not hold together to be drawn out, while in such a state, to the ordinary length of the staple, but this very state, when drawn in so short a length, as here represented, enables it to be spun very fine and evenly; for it should be stated that there is no elasticity in the fibre of flax, hemp, nettleweed or other the like substances; but when drawn by rollers so placed as aforesaid, and moving at the relative speed aforesaid (which he has previously described as being eight to one,) and in the completely saturated state aforesaid, the fibres themselves are pulled asunder and required to be twisted immediately, or the continuity of the thread would be destroyed." And, again, in specifying his claim, he declares that which he claims as his invention in respect of improved machinery for spinning flax, hemp, and other fibrous substances, is a certain trough, which he has described, and the placing of the retaining rollers and the drawing rollers nearer to each other than they have ever before been placed, (say within two inches and a half of each other) for the purpose aforesaid.

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[*538] *From this specification, it appears to have been known to the plaintiff, that the fibres which were to be spun after maceration, would be pulled asunder by drawing in his manner, and required to be twisted immediately to prevent the continuity of the thread being destroyed, and that, therefore, he placed the drawing and retaining rollers very near to each other.

He has declared that this placing of the rollers constitutes the principal improvement in the spinning machinery; and amongst the things which he claims as his invention, is this placing of the rollers nearer to each other than they had ever before been placed, (say two inches and a half off each other) for the purpose aforesaid. And it is endorsed upon the postea by the learned Judge, before whom the issue was tried, that before the granting of the patent it was not known that flax could be spun by means of maceration, as having a short fibre at a reach of two inches and a half.

But various sorts of spinning machines were, before the grant of the patent, used with slides, by which the reach was varied according to the length of the staple or fibre; for cotton spinning the reach varied from seven eighths of an inch to an inch and a quarter; for tow spinning, from four to nine inches; for worsted spinning, from five to fourteen inches; and for dry flax spinning, from fourteen to thirty-six inches; so that machinery, by which the reach was varied from less than an inch to thirty-six inches, was known before the patent was granted.

The plaintiff has found that a reach of two inches and a half, or thereabouts, is well adapted for spinning flax prepared for spinning by his process of maceration, and the question is reduced to this, whether his adopt-
[*539] ing *that particular length of reach, for the purpose of applying it to the spinning of flax so prepared, is to be considered an improved machinery in respect of which this patent can be held to be valid, and I am of opinion that it cannot.

I concur entirely with the learned Judges, and see no reason to think that any other result would follow from further investigation.

Being of opinion that the patent is invalid, it follows that the bill must be dismissed. I have considered the question of costs, and I think that I ought to make no order with respect to the costs of the issue; but the plaintiff must pay the costs of this suit and of the case.[1]

[1] If the patented machine does not differ from a previous one in its principle, but merely in its proportions, the patent is void. *Burrall v. Jewett*, 2 Paige, 145. A patent for an abstract principle is void. *Wyeth v. Stone*, 1 Story's Rep. 274.

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HILL v. GOMME.

[*540]

1839 ; July 12, 13, 15 ; August 10.

In consideration of 100*l.* paid by the plaintiff's father to A. B., the latter covenanted to maintain and apprentice the plaintiff, and that he should take a specified interest in all the real and personal estate which A. B. should possess at his death ; the condition in life of the plaintiff not having been altered, and no expectation on his part having been defeated ; Held, that this contract might be put an end to by agreement between the plaintiff's father and A. B.

Seemle, that if there had been part performance of the agreement altering the condition in life of the plaintiff, then the court would not have permitted the father to take him back to his prejudice, and would have compelled a complete performance in his favor.

Executors, whose testator died in 1827, advertised for persons having claims or demands on the estate of their testator, and having provided for all that appeared, they, in 1829, distributed the estate amongst the legatees and took from them an indemnity. A demand previously unknown both to the claimant and the executors was made against the estate in 1836, and a bill filed to enforce it : Held, that if the claim were valid, the executors were still personally liable to the plaintiff.

THE plaintiff in this cause, a pauper, prayed, that under an indenture dated the 16th day of February, 1818, he might be declared to be entitled to the personal estate of which James Dean died possessed, after the payment of his debts.

In the year 1817, John Hill, the father of the plaintiff, was an agricultural implement maker residing in Oxford Street, and James Dean was a laboring brickmaker living at a place called Brickmaker's Row, whose wife took in children to nurse.

The plaintiff was five years old on the 30th of August, 1817, and in that year was at nurse with Dean's wife, and appears to have been treated with kindness and affection by Dean.

In December, 1817, Dean left his residence in Brickmaker's Row, and undertook the business of a publican, which he carried on at the "Seven Stars" on Starch Green, and at the same time continued his employment as a laboring brickmaker.

*On the 16th of February, 1818, Dean executed a deed of that [*541] date, made between himself of the one part, and John Hill of the other part, and thereby, after reciting that Dean had no child by Elizabeth, his wife, and had agreed, in consideration of 100*l.* to be paid to him by Hill, forthwith to take, maintain, clothe, educate, apprentice, and bring up William Thomas Hill, the plaintiff, then of the age of five years and upwards ; and also that the heirs and executors of Dean should stand possessed of all the real and personal estate which should belong to him at the time of his death, on the trusts after mentioned : it was witnessed that, in pursuance of that agreement, and in consideration of 100*l.* paid by Dean to Hill before the sealing and delivery of the deed, Dean covenanted that he would, from the date of the deed, board, maintain, educate, clothe, and bring up William Thomas Hill in a suitable and proper manner, as if he were his own son ; and as soon as might be after he should have attained the age of fourteen

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years, apprentice and put him out to some trade or calling, until he should attain the age of twenty-one years, and pay the premium or apprentice fee which should be required for that purpose, and all costs, charges, and expenses, attendant on and which should be occasioned by the maintaining, educating, clothing, and bringing up of the said William Thomas Hill during his minority, by and out of his own moneys; and also that his heirs and executors should convey and assign the real and personal estate of which he should die seised and possessed, in such manner that the same should be and remain to the use of any widow of Dean for her life, and after her death to the use of William Thomas Hill absolutely, if Dean should have no child of his own; but if Dean should have any such child or children, then to the use of William Thomas Hill, and the child or children of Dean [*542] equally. *Provision was then made for the maintenance of William Thomas Hill if he should be under twenty-one years of age at the death of Dean and any widow he might leave, and for the reverting of the estate to the heirs and executors of Dean, if William Thomas Hill should die under twenty-one without issue; and power was reserved to Dean to revoke the deed, except as to any uses therein expressed for the benefit of William Thomas Hill.

The deed was executed in the presence of and attested by two witnesses, and a receipt for the consideration money was endorsed on the deed, but under the peculiar circumstances, as to the alleged payment, stated in the evidence.

It was alleged by the bill, that upon the execution of this deed, the plaintiff was taken by Dean into his own house, and adopted as his own child, but that afterwards the plaintiff was sent home to his father; and it was agreed between the plaintiff and the defendants, that in fact, notwithstanding the deed, the plaintiff was, in the words of the bill, "maintained, educated, clothed, brought up and apprenticed by his father, John Hill, or out of his estate;" and the plaintiff appeared to have been brought up by his parents in entire ignorance that any such provisions was intended for him.

The plaintiff's father lived about eight years after the date of the deed, and in 1826 died intestate, leaving a considerable property, of which the plaintiff, as one of his children, was entitled to a distributive share with the other children.

James Dean died without issue in September, 1827, having made [*543] a will, by which he disposed of his *property without any regard to or notice of the deed and property, which was stated to amount to 1200*l.*, had been long since distributed. The executors after having inserted advertisements in two London papers, calling on all persons having claims or demands against the estate of Dean, to forward the same, and having provided for all known demands, ultimately distributed the testator's property in 1829, either according to the directions of the will, or by agreement among the parties interested under it, and at the same time they took an indemnity.

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Elizabeth Hill, the widow of John Hill, was the administratrix of his estate; she died in March, 1831, and the plaintiff being then an infant, administration during his infancy was granted to Samuel Henry Manley. The plaintiff attained twenty-one years of age in August, 1833, and then refused to take the administration upon himself.

In April, 1836, letters of administration of the estate of John Hill, then unadministered by Elizabeth Hill, were granted to Richard Hill, a younger brother of the plaintiff; and on that occasion, Mr. Manley delivered to Richard Hill a small box which had belonged to John Hill, and was supposed to contain only old expired leases, and other useless documents, and which, on that account, Mr. Manley had never examined.

In this box, and placed together with such useless documents, Richard Hill found the deed of the 16th of February, 1818; he delivered it to the plaintiff, who soon afterwards claimed the benefit of it from the defendants; and the plaintiffs having soon afterwards obtained from Richard Hill an assignment of any interest which might belong to the estate of John Hill under the deed, filed this bill, claiming to be entitled to all the [*544] estate of James Dean, after payment of his debts and funeral and testamentary expenses, subject to the life interest of the widow of James Dean, now Mrs. Vaile.

The material parts of the evidence were as follows:—At the date of the transaction, the witness, John Taylor, then about seventeen years of age, was living with his uncle, Mr. William Brill, who was the solicitor of the parties in the preparation of the deed. He proved that no pecuniary consideration was at first intended, “that it was at first proposed that the consideration should be natural love and affection on the part of Dean,” but counsel raising some objection, it was ultimately agreed that the consideration for the deed should be the sum of 100*l.*; he said that the instructions were given by both parties, that his uncle saw them several times on the subject, that the interviews sometimes took place at his uncle’s chambers, sometimes and more frequently at John Hill’s house, and that his uncle went two or three times to Dean’s house at Starch Green; that he generally accompanied his uncle, and at John Hill’s house was present at the interviews, but at Starch Green was left outside with his uncle’s gig.

Mr. Brill, one of the witnesses to the execution of the deed, was dead, the other attesting witness, Thomas Hill, was alone examined on behalf of the plaintiff, who said that he saw it signed, sealed, and delivered by Dean and Hill, and that at the same time Dean signed the receipt for the consideration money; but he said no money actually passed between the parties in his presence, but he believes that John Hill paid whatever was coming from him to James Dean on that occasion, according to the deed, for when the parties and witnesses had signed, John Hill remarked, that he be- [*545] lieved that the business was all concluded except paying the money, and he put his hands to his pocket as if he were going to produce the money;

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and as the witness had nothing further to do in the business, he withdrew and left the parties to themselves."

As to the deed being acted on, the witnesses Sarah Gilling and the two Jennings spoke only to the time when Dean was living at Brickmaker's Row, which was before the date of the deed. Thomas Hill was in the employ of John Hill from about 1817 to 1826, when he remembered that plaintiff was living away from the house of his father during part of the time that he was in the father's employ: he could not very distinctly state how long or what period he was thus living away, but to the best of his recollection, that plaintiff was not living at home at the time of the deed being executed, and remained away for some time, &c.

Rangeley entered into the service of John Hill as carman, in January, 1817, and remained with him till his death, and stated that to the best of his recollection, the plaintiff was living away from home at Christmas, 1817, and during the greater part, if not the whole, of 1818, and was out at nurse somewhere.

The cause now came on for hearing, when, on behalf of the defendants, the following objections were raised to the relief asked by the plaintiff.

First, That the presumption arising from the receipt on the deed had been rebutted by the evidence of the plaintiff's witness Thomas Hill, from which it appeared that the 100*l.* had never been paid to Dean; besides this [*546] Dean never had the solace and comfort which he "intended to secure himself by the adoption of the child; that consequently the consideration necessary to support this deed failed, and the transaction being a mere *nudum pactum* could not be enforced in equity. *Darley v. Darley.*(a)

Secondly, That Dean himself could not have enforced the contract against John Hill the father, for he could not have maintained a suit against the father for the delivery up of the child; there being, therefore, no mutuality, Hill on his part, and those claiming under him, could not have enforced it against Dean.

Thirdly, That the plaintiff, not being a contracting party to the deed, could not sue upon it; that his rights were derivative from, and could only be worked out through his father, who himself could not have enforced it; that putting the case in the most favorable light for the plaintiff, and supposing him to have been a party to the deed, then, as an infant, he would not have been bound by the contract, so conversely, he could not insist on its specific performance. *Flight v. Bolland.*(b)

Fourthly, That if a valid binding contract ever subsisted, it had never been acted on, or had been abandoned by the mutual consent of competent parties; that it had been decided in this court, that where two persons enter into a contract for the benefit of a third, they can by mutual agreement abandon it. *Colyear v. Lady Mulgrave.*(c)

Fifthly, That this was a contract contrary to the policy of the law, for

(a) 3 Atk. 399.

(b) 4 Russ. 298.

(c) 2 Keen, 81.

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thereby a parent was contracting for the relinquishment of his child, the father thus depriving *his son of that parental care which by the [*547] law of nature he was entitled to, and relieving himself from those moral duties and obligations which a parent owed to his child. If such a contract were held valid, then, where a father in good circumstances contracted to abandon his child to a man of the lowest and meanest estate and condition, the court might be obliged to enforce the contract.

Sixthly, That the specific performance of contracts was discretionary, and that the court would only interfere in those cases where every thing appeared fair, clear and reasonable; that here the contract was vague, the circumstances doubtful, and the bargain most improvident and unreasonable, as depriving Dean of the possibility of acquiring any future property over which he might exercise a free power of disposing thus taking away every inducement to future exertion. *Kemble v. Kean*,(a) *Kimberley v. Jennings*.(b)

Lastly, That the executors, who had taken every precaution,—who had used every exertion, by advertisements and otherwise, for ascertaining all the outstanding claims against the estate,—who had been guilty of no precipitation in its administration, and had paid over the assets without notice of the latent claim of the plaintiff, could not, after the lapse of twelve years, be called on to make good to the plaintiff the funds so paid over.

On behalf of the plaintiff it was answered,

As to the first objection, that here was a deed deliberately prepared by and executed in the presence of and attested by a professional man and another witness, with two receipts for the consideration money, one in the *body of the deed, and the other endorsed on it and attested by two [*548] witnesses; that no better proof of payment could be adduced than this distinct acknowledgment in the most solemn form, by the party himself that the money had been paid; that it would be most dangerous to give way to the notion that the circumstance of one of two witnesses not having seen the money actually paid was sufficient to invalidate a deed and outweigh the acknowledgment of the party himself; that no man's rights or property would be safe if the effect of a deed was to be defeated by a mere doubt as to the payment of the consideration money; that it must be assumed that the money was paid, for the deed would not have been handed over until it had been paid. That a pecuniary consideration was not necessary to support it, and Dean might have handed back the consideration the moment after he had received it; and that, as between parent and child, this court would enforce a voluntary agreement, *Ellis v. Nimmo*;(c) would supply a surrender of a copyhold, or aid the defective execution of a power.

As to the *second* objection, that a benefit being purchased for the plaintiff by his father, the court would, if beneficial to the plaintiff, have enforced the

(a) 6 Sim. 333. (b) 6 Sim. 340. (c) Llo. & Goo. 333. [See as to this case, ante 451, n. g.]

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contract against the father, and have prevented him interfering with the plaintiff. *Lyons v. Blenkin.*(a)

As to the *third* objection, that this was the purchase of a reversionary interest by a father for his child, and was as much an advancement for him as if the father had purchased an estate in his child's name; that the plaintiff, in his own right, was entitled to enforce the contract which so intimately affected his rights, as well as his situation and prospects in life; that here he claimed, not only in his own right, but as representing his father.

[*549] *As to the *fourth* objection, that it had been established by the evidence that the deed had been acted upon, and that the plaintiff had been at the house of Dean in the years 1816, 1817, 1818, and 1819; that though Hill the father might have abandoned that part of the contract which was beneficial to him alone, viz. the obligation of Dean to maintain the plaintiff, yet it was not competent, either to the plaintiff's father or Dean separately, or to both together, to put an end to the provisions of the deed to the prejudice of the rights of the plaintiff; that if (as was said) the deed had been abandoned, it was strange that it should be found uncanceled in the custody of Hill; that the case of *Colyear v. Lady Mulgrave* did not apply, for the difficulty there was, that the court could not separate the two characters of the defendant, who represented both the contracting parties; and there, too, the plaintiff was a natural child, and therefore in law a stranger; here the plaintiff claimed both in his own right and in right of his father; as representing his father he had a valuable, and as a child in his own right he had a meritorious consideration to support his claim.

As to the *fifth* objection, that there was nothing contrary to the policy of the law in allowing a parent, for the benefit of his child, to contract for his adoption by another person.

As to the *sixth* objection, that however uncertain and vague covenants to settle or leave all future property might be, still they had been too long acted upon and recognized, to be now permitted to be called in question. *Prebble v. Boghurst.*(b)

[*550] *As to the *seventh* objection, that the very point had been distinctly decided by the Master of the Rolls and the Lord Chancellor on appeal in *Knatchbull v. Fearnhead*;(c) and that the executors had an indemnity which they might enforce.

(a) Jacob 245.

(b) 1 Swan. 309, 580. 7 Taunton, 588; and see *Lowther v. Earl of Westmoreland*, 1 Cox, 64. *Randall v. Willis*, 5 Ves. 262. *Lewis v. Madocks*, 8 Ves. 150, 17 Ves. 48. *Porteacue v. Hennah*, 19 Ves. 66. *Needham v. Smith*, 4 Russ. 318. *Graftley v. Humpage*, ante, 46. *Tawney v. Ward*, post, 563. [4 Russ. 324, n. 1.]

(c) 3 Myl. & Cr. 122, and see *Evcles v. Lambert*, Styles, 37, 54, and 73, and Aleyn, 38. *Nec-ton v. Gennet*, Cro. Eliz. 466. *Brooking v. Jennings*, 1 Mod. 174. *Harman v. Harman*, 3 Mod. 115. *Sawyer v. Mercer*, 1 Term Rep. 690. *Hawkins v. Day*, Blunt's Ambler, 160, and Appendix, 803, and 3 Mer. 555, n. *Simmons v. Bolland*, 3 Mer. 547. *Governor &c. of the Chelsea Water Works v. Cowper*, 1 Esp. 275. *Richards v. Browne*, 3 Bing. N. C. 493. *Davy v. Black-*

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Mr. *Pemberton* and Mr. *G. L. Russell*, for the plaintiff.

Mr. *Tinney*, Mr. *Bethell*, Mr. *Kindersley*, Mr. *Chandless*, Mr. *Weld*, Mr. *George Turner*, Mr. *Mylne*, Mr. *Armstrong*, and Mr. *S. Atkinson*, for the several defendants.

Mr. *Pemberton*, in reply.

August 10.—THE MASTER OF THE ROLLS (after stating the above circumstances) said, the defendants insisted, first, that under all the circumstances of the case, the plaintiff has no title to the relief he prays; and, secondly, that if he had originally a title, yet that after such an administration and distribution of the estate of James Dean as is stated in the answer, the defendants ought to be protected from all liability.

I am of opinion, that if the plaintiff was entitled to the estate of James Dean at the time of his death, the defendants are still liable, [*551] and that the sole question in the cause depends upon the plaintiff's title under the deed.[1]

The deed itself is very singular, whether we regard the particular provisions which it contains, or the relation which subsisted between the parties to it. On the one hand we have a tradesman, apparently in good circumstances, with a family of children; on the other hand a laboring brickmaker, without children, and in circumstances which enabled him, at the time when the transaction in question took place, to commence and afterwards to carry on the business of a publican, which he seems to have done by the aid of his wife, whilst he himself continued his employment of a laboring brickmaker.

For his station in life he must also be considered to have been in circumstances which were good, though inferior to the circumstances of Hill.

For the plaintiff it was alleged, that the covenants of the deed were an advancement obtained by Hill for his son; that the sum of 100*l.* was actually paid for it, but that the deed was of such a nature as to require no pecuniary consideration to sanction its validity; that the deed was for a time acted upon; but that whether acted upon or not, it was binding upon the parties, for the benefit of the plaintiff, from the moment of its execution, and that they had no right to abandon it and waive its provisions. The argument for the plaintiff is, that this arrangement was an advancement, as much as if Hill had purchased an estate in the name of his son.

On the other hand, the defendants say that Dean was an illiterate man, and could not have understood the deed; that when the arrangement was first proposed *no pecuniary consideration was intended; [*552]

well, 9 Bing. 5. *March v. Russell*, 3 Myl. & Cr. 31. *Vernon v. Lord Egmont*, 1 Bli. N. S. 554. *Wildridge v. McKane*, 1 Molloy, 122. *Norman v. Baldry*, 6 Sim. 621. *Pearson v. Archdeaken*, 1 Alcock & Sloper, 23. *Smith v. Day*, 2 Mee. & W. 684.

[1] To obtain complete exoneration, executors should pass their accounts. *Low v. Carter*, ante, 426. *Knatchbull v. Fearnhead*, 3 Myl. & Cr. 526. After what lapse of time an executor will not be directed to account, see *Rayner v. Pearsall*, 3 Johns. Ch. Rep. 578, 586. And see *Hamley v. James*, 5 Paige, 442, 498. *Gilchrist v. Rea*, 9 Paige, 66, 73.

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that the consideration of 100*l.* was inserted only to satisfy the scruples of the legal adviser, who was consulted by the parties and was not paid; and that if it had been paid it would not have been sufficient; that the deed was never acted upon, or that if acted upon at all, it was very soon abandoned; that it was a mere arrangement between the parties, which they were at liberty to abandon, and which they did abandon; that the circumstances, condition, and expectations were never changed; and that he never had any equity to enforce the deed. [His Lordship stated the evidence of Taylor.]

It seems strange that Mr. Brill should find it necessary to have such frequent communications with the parties on the preparation of the deed, and that he should himself go to their houses so often in the way he is stated to have done; but this is the only evidence, and upon it I must consider that the deed was carefully prepared from the instructions of the parties. [His Lordship stated the evidence of Thomas Hill.]

These circumstances would, in ordinary cases, be sufficient to prove payment of the consideration money; but the witness goes on to state a fact showing that the consideration money was not paid at the time when the deed was executed and the receipt signed for the same. The witness says, Hill remarked, "he believed that the business was all concluded except paying the money." This is inconsistent with the notion that the money had then been paid; and though the witness proceeds to say, that Hill put his hand into his pocket as if he were going to produce the money, yet he did not see the money paid; but having, as he says, nothing further to do in the business, he withdrew and left the parties to themselves. On this evidence

I do not consider the payment of the money to be well proved.

[*553] "The evidence as to the deed being at all acted upon is unsatisfactory.

[His Lordship next stated the evidence of Sarah Gilling, the two Jennings and Rangeley.]

Considering that in fact the plaintiff was at nurse with Dean in the year 1817, and having regard to the lapse of time after which the witnesses are speaking, and to the uncertainty with which these witnesses express themselves, I do not think it proved that the plaintiff did go to reside with Dean in pursuance of the deed; and the rather, because Mr. Manley, who married a sister of Mrs. Hill in the year 1818, had heard nothing about the matter, except that about the time of his marriage the plaintiff was out at nurse with Mr. and Mrs. Dean; and because a witness, Pither, who lived at the "Seven Stars" when Dean took the house, and continued to live there, remembers the boy going repeatedly, but does not recollect his ever staying in the house on a visit, and does not even know of his sleeping there, though he might have done so without the witness knowing it.

But, however doubtful it may be whether the plaintiff ever resided with Dean after the execution of the deed, or otherwise than as a nurse child, it is clear, that soon after the execution of the deed, he was residing with his

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father in his father's house, that the father never afterwards required Dean to perform the covenants, and that the plaintiff's condition was in no respect changed,—his *status* remained as it was,—he was educated and brought up by his father; and, under these circumstances, I am of opinion that it was intended that the covenants of the deed should not be enforced; and if the deed was capable of being abandoned, I think that it was so.

"The case has been compared to that of a father purchasing an [*554] estate in the name of his son, which would be deemed an advancement, if no contemporaneous evidence of a contrary intention were produced; but in such cases the estate has become vested in the son by the act of the father, and the relation which subsisted between father and son is deemed evidence to rebut the resulting trust which, in ordinary cases, would prevail. In the present case the rights of the parties rested on covenant between Hill and Dean: Hill, on the one hand, was purchasing at the same time a benefit for his son, and a benefit for himself,—relief from his obligation to maintain and provide for his son; and on the other hand, Dean, in undertaking the burden, was to have not only the 100*l.* if that were really intended, but also the gratification of that affection which the plaintiff has produced witnesses to establish, and was to leave his property to a boy educated and brought up by himself.

There is nothing to show that it was the refusal of Dean which occasioned the non-performance of the deed: for any thing that appears to the contrary, Hill may have refused to part with his son, or having parted with him, may at a very early period have insisted on taking him back again; and if he did so, Dean could scarcely have been compelled to perform that part of the covenant which was still in his power.

If Dean had, in pursuance of the deed, taken the boy home and brought him up, there would have been a part performance altering the condition in life of the boy; and in such circumstances I incline to think that this court would not have permitted the father to take him back to his prejudice, and would have compelled a complete performance of the covenants in his favor; *but this state of circumstances never arose, there was [*555] no appreciable part performance of those parts of the covenants which affected the boy: if taken from home at all, it was for a very short time, and no more altered his condition in life, than merely sending him out as a nurse child would have done. After the boy returned home, I think that Dean could not have compelled the father to send him back; and if the father refused to give up the son, and Dean could not have had the benefit (if thought one) of that material part of the arrangement, I think that he could not be compelled to give his property to a person whom he had not been permitted to educate, though he had stipulated to give it to the same person, under an arrangement by which he was to be allowed to educate him.

On the whole, I consider this was an arrangement which, if not performed

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to an extent to alter the condition in life and expectations of the plaintiff, might have been put an end to by an agreement between Dean and Hill, and I think that the evidence shows that it was put an end to. The means indeed, or the arrangements made between the parties for the purpose, do not appear, and a considerable degree of mystery hangs about the whole transaction; but it being clear that the condition in life of the plaintiff was never altered, and no expectations of his ever defeated; and that for the several years after the date of the deed, during which both Hill and Dean lived, the deed was not acted upon, I think there is sufficient ground to presume that it was abandoned, and that with respect to the consideration, if any was paid, all that was necessary was done mutually to release the parties; and I think that this presumption is not rebutted by the single fact, that the deed [566] itself was found uncanceled among expired patents and other documents considered to be wholly useless.

Bill dismissed.[1]

Affirmed by the Lord Chancellor, December 24th, 1839.

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1839: July 30.

Where a plaintiff wilfully misrepresents his place of residence on the record, he will be ordered to give security for costs, but this rule does not extend to cases where it is done innocently, and from mere error.

THIS bill was filed on the 6th of June, 1839, by Henry Adam Simpson, described as "of No. 3 Regent's Terrace, Regent street, Lambeth, in the county of Middlesex, water-gilder," and by "James Simpson of 22 Church street, Lambeth aforesaid, plumber."

It was now moved on behalf of the defendant, that the plaintiffs should give security for costs on the ground that they had incorrectly described their residences in the bill.

The affidavit in support of the application showed, that at the time of filing the bill neither of the plaintiffs were, nor had they been for some time previously, resident at the places stated on the bill.

The plaintiff, H. A. Simpson, in answer to the application, made an affidavit, stating, "that at the time of filing the bill, and some time previous thereto, he, in consequence of his having been engaged in different parts of

[1] How far the court will interfere to enforce the performance of a mere personal act, see further *Brough v. Oddy*, 1 Russ. & M. 55. S. C. Taml. 215. *Baldwin v. The Society for the Diffusion of Useful Knowledge*, 9 Sim. 393. *Thornbury v. Bevil*, 1 Yo. & Coll. C. C. 554. *Storer v. Great Western Railway Co.*, 2 Yo. & Coll. C. C. 48. *Hamblin v. Dinneford*, 2 Edw. Ch. Rep. 529, and other cases also referred to by the Editor, 9 Sim. 395, n. 2.

1839.—Simpson v. Burton.

the neighborhood of London, in his business of water-gilder, &c., had no fixed place of residence, and that the place mentioned in the bill was the best address he could then give, and the only one where he was likely to be heard of for any length of time."

*James Simpson, by his affidavit, stated, "that at the time of the [*557] filing of the bill in this cause, he had not any settled or fixed place of residence, as he was travelling about the country to get his livelihood, and could always be heard of at No. 22 Church Street, Lambeth, his residence stated in the bill, and where he was in the habit of referring for his address."

They both stated that the addresses mentioned in the bill were given for the reasons stated, and not in order to enable them to evade the process of the court.

The defendant's solicitor, on the 2d of July, applied to the plaintiffs' solicitor, by letter, for their addresses, who stated that he would apply to the plaintiffs, and ascertain if they had changed their addresses; and he accordingly wrote to the plaintiff H. A. Simpson, addressed to him at No. 3 Regent's Terrace. On the 3d of July, notice of this motion was given, and shortly afterwards H. A. Simpson called on his solicitor in consequence of the letter.

The present residences were stated in their affidavits.

Mr. *Kindersley*, in support of the motion.

Mr. *Pemberton*, contra.

Sandys v. Long,^(a) *Fraser v. Palmer*,^(b) *Daniel v. Sargon*,^(c) were cited; and see *Bailey v. Gundrey*,^(d) and *Calvert v. Day*.^(e)

*THE MASTER OF THE ROLLS:—There can be no doubt that [*558] it is the duty of a plaintiff to state his place of residence truly and accurately at the time he files his bill, and if, for the purpose of avoiding all access to him, he wilfully misrepresents his residence, he will be ordered to give security for costs. I do not think the rule extends to a case where he has done so innocently and from mere error. The plaintiffs, I think from the evidence, acted wrong; at the time when the bill was filed, they were neither of them residing at the places stated upon the record; but did they describe themselves wrong with a view of misleading any person? It appears, that when the defendant went to search for them at the places stated on the bill, they could not be found there, and he certainly received answers which were very unsatisfactory; but when the defendant applied to their solicitor, the latter wishing to communicate with the plaintiffs, wrote to one of them at the very place designated by the record; the defendant would not wait for the answer, which did, however, come in consequence of the letter addressed to that place. The plaintiffs are not out of the jurisdiction, their residence, which was found by means of the description on the record, is now stated, and under these circumstances, I

(a) 2 Myl. & K. 487. S. C. 7 Sim. 140.

(b) 3 Y. & Col. 279.

(c) V. C. Hil. term, 1839.

(d) 1 Keen, 53.

(e) 2 Y. & Col. 217.

1839.—Willis v. Kibble.

think that I ought not to make the order asked ; seeing, however, at the same time, that these plaintiffs have not truly described themselves upon the record as they ought to have done, it is impossible for me to give them any costs.[1]

[*559]

*WILLIS v. KIBBLE.

1839 : July 9.

A testator devised and bequeathed his freehold and leasehold estate to trustees for sale, and he "declared that his trustees respectively should be entitled to have and receive, out of the trust moneys, all costs, charges and expenses, fees to counsel and for advice, and for professional assistance, and loss of time, paid, incurred, sustained or occasioned in or about the execution of the said trusts or in anywise relating thereto." One of the trustees was a land surveyor, and he superintended the management and sale of the estates : Held that he was entitled to a compensation for loss of time.

THE testator in this cause by his will devised and bequeathed all his real and leasehold estates to John Kibble and Joseph Randolph, upon certain trusts, for sale, and his will contained the following clause :—"And I declare that my said trustees respectively shall be entitled to have and receive out of the trust moneys all costs, charges and expenses, fees to counsel, and for advice, and for professional assistance, and loss of time, that may be paid, incurred, sustained or occasioned in or about the execution of the and trusts, or in any wise relating thereto."

John Kibble was a land agent. After the testator's death, he took upon himself the active management of the testator's estates and property, and su-

[1]. The names of the parties, whether plaintiff or defendant, with their descriptions and places of abode should be stated in the bill. Story's Eq. Plead. § 26. "The object in each case of giving the names and descriptions of the parties, is to enable the court and the other parties in interest, to know where, and to whom they may resort to compel obedience to any order or process of the court, and especially an order for the payment of costs, as well as to furnish distinct means of decision in all future controversies in regard to the subject matter, and the identity of the parties." Ibid. In Lubé's Eq. Plead. 197, (Am. ed.) it is said ; "The additions, and places of abode of the complainants, should be specifically stated, both to prevent suits from being commenced in the names of fictitious persons ; and also that the defendants may know where to resort for redress, in case the proceedings should be deemed vexatious ; the practice of taking security for that purpose having been long since disused, except when the complainant resides out of the jurisdiction."—"If the plaintiff describes himself in his bill, of a place where he cannot be found, he must give security." 2 Fowl. Exch. Pract. 370, cited by Lubé, ubi sup. In *Howe v. Harvey*, 8 Paige, 73, Walworth, Ch. said ; "It appears to be laid down in all the books upon chancery pleading, that the residence or abode of the complainant should be stated in the bill ; though by the practice in this state, a particular description of his calling or business does not appear to be necessary." Whether a demurrer, or plea in abatement, would lie, in the one case for an omission, or in the other for a mis-statement, it was unnecessary for the Chancellor to decide ; but he observes that, "the modern practice appears to be, instead of demurring to the bill where the residence of the complainant is not stated, or if pleading the part in abatement, where his residence is not truly stated therein, to apply to the court for an order that the complainant give security for costs." And see 1 Barb. Ch. Pract. 35. 1 Keen, 55, n. 1.

 1839.—*Mills v. Finlay*.

perintended the repairs, &c. ; and before the institution of the suit had effected sales of forty-four lots of the property.

By this petition, which stated he had been employed one hundred and thirty-eight entire days, besides parts of other days in the execution of the trusts of the will, he sought a declaration, that he might be allowed, in passing his accounts, the sum of 289*l.* 16*s.* for his loss of time, at the rate of two guineas a day.

Mr. *Parry*, in support of the petition.

Mr. *Stinton* and Mr. *T. H. Hall*, contra, contended that the law was now clearly settled that a trustee was not entitled to a remuneration for his loss of time, **Moore v. Frowd* ; (a) that the compensation "for loss of [*560] time," referred to by the testator, was that of counsel and professional men employed, and not of the trustee.

Mr. *Parry*, in reply.

THE MASTER OF THE ROLLS considered that, upon the terms of the will, the petitioner was entitled to remuneration for his loss of time, and that it must be referred to the Master to settle the amount : but as the petitioner had made no claim by his answer, and had thus given no opportunity of referring the matter to the Master, when the case was before the court on a former occasion, he must pay the costs of the petition.

MILLS v. FINLAY.

1839 : August 10.

A client deposited with his solicitor the title deeds of an estate, to secure a sum of money then due, and certain costs then incurred : the court, on the petition of the client, ordered the deeds to be delivered up to the client, on his paying into court a sum sufficient to cover the solicitor's claim, and directed the usual taxation.

MR. EDWARD RICE had been employed as solicitor for the plaintiff, Captain Mills, in this suit, to which Mr. R. had been made a defendant, in consequence of his having a charge on the shares of Captain Mills and his sisters, for securing any advances not exceeding 2000*l.* In respect of this charge Mr. Edward Rice, in August, 1838, received 2143*l.*

Captain Mills became the purchaser of certain freehold property under the decree ; and on the 3d of August, he deposited the title deeds with Mr. E. Rice, and at the same time signed the following *memorandum :— " Mr. Rice, I hereby admit myself to be indebted to you in the sum of five hundred and thirty-one pounds, four shillings and four pence, exclusive of the costs incurred by Gibbon, and of completing the purchase of the freehold houses bought by me at the sale *Mills v. Finlay*, and do hereby, as security for the payment thereof, with 5 per cent, authorize you to

(a) 3 Mylne & Cr. 45, and see *Collins v. Carey*, post, [Vol. 2, 128. *Hopkinson v. Roe*, ante, 83. 3 Myl. & Cr. 51, n. 2.]

 1839.—*Mills v. Finlay*.

obtain and retain the title deeds relating thereto, upon your releasing what, if any, security you may have against me personally, on the several shares of my late sisters, Louisa and Emmeline. This memorandum is to be taken as subject to the law costs being examined by me, and in the event of any mistake, to be corrected accordingly.

3d August, 1838,

Jas. Mills."

Some other transactions and proceedings took place between Captain Mills and Mr. Rice, and Captain Mills afterwards changed his solicitor. Being unable to maintain a settlement of the accounts between him and Mr. Rice, he presented a special petition, praying that on payment by him into court of the sum of 350*l.*, or such other sum as the court should direct, Mr. Rice should deliver up the title deeds, papers and writings, belonging to the petitioner, and for a reference to the Master to tax the bills of Mr. Rice, and ascertain the amount due to him, in respect of all his claims from the petitioner, and for consequential directions.

Mr. *Pemberton* and Mr. *J. Moore*, for the petitioner.

Mr. *Stinton*, *contra*, contended that this application was irregular in form, as the petitioner might have obtained the order of course for the taxation of his solicitor's bills, without coming to the court on a special petition; and secondly, that it was contrary to the practice of the court to order the [*562] delivery up of *deeds deposited as a security, before the money had actually been paid into the hands of the party holding them as a security. (a)

Mr. *Pemberton*, in reply, said there was this specialty in the case,—it was a dealing between a solicitor and his client.

THE MASTER OF THE ROLLS:—I do not consider this application irregular: a solicitor holds these title deeds as a security for the whole of his claim, and what is asked is, that he may give up the deeds on payment into court of a sum sufficient to cover that claim. This being done, I do not think the solicitor ought to be permitted to retain the deeds.

I have no doubt, except as to the sum to be paid into court. I think that Mr. Rice has a right to have the full amount paid in; and if he will inform the court, by affidavit, that the sum, which appears from the affidavit filed in support of the petition to be due, is inadequate, I will see that he has a sum paid into court sufficient to cover his claim and to secure him.[1] He is the plaintiff's solicitor, and I look upon him wholly in that character on this occasion.

My intention is that he should have full security; but it would be unjust

(a) See *Livesey v. Harding*, ante, 343, and the cases there cited.

[1] Where the client makes a summary application to the court, against his attorney or solicitor, instead of instituting a suit against him to compel such attorney or solicitor to do him justice, the latter is entitled to the benefit of using his own affidavit in resisting such application. *Merritt v. Lambert*, 10 Paige, 352.

1839.—Tawney v. Ward.

to allow him to retain his client's title deeds, if a sum of money sufficient to meet the whole of his demands is deposited in court.[1]

*TAWNEY v. WARD.

[*563]

1839; June 27, July 19, 23, 24.

A testator having given property to his wife while unmarried, and after her decease to his children "then living:" Held, that the children living at that time, alone would take, unless it appeared upon the construction of the whole will, and to effectuate a clear intention appearing in other parts of it, that the words "then living" ought to be rejected as repugnant, or to be qualified in order to give effect to other words inconsistent with them.

A testator, having three children, gave his property to his wife so long as she lived unmarried, and if she married and her children resided with her, an allowance was to be made to her; and "after her decease the testator bequeathed his property equally between his children then living;" he directed his farm to be allotted as part of his son Thomas' share, and "he wished whoever might enjoy his farm, if unfortunately his children should fail of heirs," should take his name; and he directed his daughter's share to be secured for her separate use. The son died in the life of the mother: Held, that he took no interest in the property.

The testator desired his daughter's share to be secured in the funds, and for his trustee to pay her the dividends; and he wished that neither the principal or interest of the funds should be subject to the control of any husband she might marry, but that the same should stand subject to her will only, properly executed, whether covert or sole, at her decease: held, that the daughter took an absolute interest for her separate use.

A feme being entitled to a reversionary interest in property for her separate use, both she and her intended husband separately covenanted to settle any property which she, or her husband in her right, was or might become entitled to, upon certain trusts: the above interest having fallen into possession, held, that it was subject to the trusts of the settlement.

The testator desired his daughter's share to be secured in the funds, and for his trustee to pay her the dividends; and he wished that neither the principal or interest of the funds should be subject to the control of any husband she might marry, but that the same should stand subject to her will only, properly executed, whether covert or sole, at her decease: Held, that the daughter took an absolute interest for her separate use.

A feme being entitled to a reversionary interest in property for her separate use, both she and her intended husband separately covenanted to settle any property which she, or her husband in her right might become entitled to, upon certain trusts; the above interest having fallen into possession, held, that it was subject to the trusts of the settlement.

THOMAS GHORST TAWNEY, the testator in this cause, at the date of his will, had three infant children, Thomas, James and Anne.

By his will, he gave his stock in the funds and his farm to a trustee, whom he also appointed executor, on trusts, which he declared as follows:—"First, to employ Mr. Webster to put the above funds and farm under the care of the Court of Chancery, in order to my said trustees paying all the interest

[1] As to the solicitor's lien, see further *Livesey v. Livesey*, 1 Russ. & M. 10. *Wickens v. Townsend*, id. 361. *Heslop v. Metcalfe*, 3 Myl. & Cr. 183, 190, n. 1. S. C. 8 Sim. 622. In *the Matter of Rice*, 2 Keen, 181, 183, n. 1, 2. *Bawtree v. Watton*, id. 713, 719, n. 1. *Cane v. Martin*, 2 Beav. 584. *Brassington v. Brassington*, 1 Sim. & Stu. 455, 457, n. 1. *Warburton v. Edge*, 9 Sim. 508, 514, n. 1. *Perkins v. Bradley*, 1 Hare, 231. *Hall v. Laver*, id. 571, 577.

1839.—Tawney v. Ward.

and rent as they become due to my dear wife, so long as she remains unmarried; but if she marries, then such payments to cease, except my children, as seems very likely and I hope, will live with their mother, then a handsome allowance shall be continued to be paid so long as my said child or children shall live with their mother, who, upon all occasions of [*564] difficulty, will apply to their *excellent mother for advice. If my dear wife continues unmarried she shall receive the whole rent and dividends as long as she lives; *and after her decease I bequeath my property equally between my children then living.* And I will and direct, if possible, my farm may be allotted as part of my son Thomas' share, and wish whoever may enjoy this farm, if unfortunately my children should fail of heirs, should take the name of Tawney; and after the order of reversion, if my children fail, it shall go thus, Thomas Hardiman, Francis Hardiman, Tawney Cutlack, William Cutlack, and their male heirs,—legal male heirs. My daughter's share I would have secured in the funds thus:—for my excellent trustee and friend to pay her the dividends as they become due; and it is my further will that neither principal or interest of the said fund here bequeathed shall be subject to the control or debts of any husband she may marry, but the same shall stand under the direction of the Court of Chancery, subject to her will only, properly executed." "My copyhold lands are of inheritance and principally bought by me, but I have made a surrender to the use of my will, though my son Thomas would take them without a will."

The testator's three children survived him: Thomas attained twenty-one, but died in January, 1837, in the lifetime of the testator's widow; Elizabeth Tawney, the widow of the testator, died in October, 1837; and James and Anne survived him.

Mr. *Pemberton*, Mr. *Kindersley* and Mr. *O. Anderdon*, on the behalf of the plaintiff, contended that Thomas, notwithstanding his death in the lifetime of his mother, acquired a vested interest in a third share of the [*565] testator's property. They cited *Howgrave v. Cartier*,(a) **Torres v. Franco*,(b) *Maitland v. Chaile*,(c) *Tucker v. Harris*,(d) *Whatford v. Moore*,(e) *Woodcock v. The Duke of Dorset*,(g) and see *Wordsworth v. Wood*, post.[1]

Mr. *Tinney* and Mr. *Turner*, contra, for the defendant Mrs. Proctor (the daughter Anne,) insisted, that on the death of the testator's widow, the whole property vested in equal shares to the two children then living.

Mr. *Teed*, for the defendant Ward.

Mr. *Pemberton*, in reply.

July 19.—THE MASTER OF THE ROLLS:—The words "then," which is

(a) 3 V. & B. 79.

(b) 1 Russ. & M. 649.

(c) 6 Mad. 243.

(d) 5 Sim. 538.

(e) 7 Sim. 574; and 3 Mylne & C. 270.

(g) 3 B. C. C. 569.

[1] Reported 2 Beav. 25. Affirmed by Lord Cottenham, 4 Myl. & Cr. 641.

1839.—Tawney v. Ward.

used by the testator, refers to the time of his wife's death; and the children who were living at that time are the only children to take under the gift, unless it should appear, that upon the true construction of the whole will, and to effectuate a clear intention appearing in other parts of it, the words "then living" ought to be rejected as repugnant, or to be qualified in order to give effect to other words inconsistent with them.

The testator gave the income of his property to his wife for life, only in the event of her continuing unmarried; in the event of her marrying, he directed that her income should cease, unless his children should live with her, in which case he wished a handsome allowance to be made; he has not directed what was to be done with any part of the income, in the event of his *wife marrying and all or any of the children not [*566] choosing to live with her. It is evident from this and other parts of the will, that he had taken a very imperfect view of the contingencies which a prudent man would have provided for; but the only question is, whether there is any thing in this or the other clauses of the will inconsistent with the words "then living," as describing the children who were to take on the death of his wife; and I think that all which can be collected from this clause is that the testator wished an allowance to be made to his wife for such of his children as should be living and residing with her after a second marriage. He has not provided any maintenance for the children during their mother's widowhood, or for such children as might not reside with her after her marriage; and I think that no inference as to the time of vesting can be deduced from so imperfect a direction as this.[1]

Having bequeathed his property equally between his children living at the death of his wife, he had particular regard to the shares of his son Thomas and his daughter Anne: he wished Thomas to have the farm allotted in his share, and he wished his daughter's share to be secured in the funds, and he gave special directions as to each.

As to the son's share he says, "I will and direct, if possible, my farm may be allotted as part of my son Thomas' share, and wish whoever may enjoy his farm, if unfortunately my children should fail of heirs, should take the name of Tawney; and after the order of reversion, if my children fail, it shall go thus:—Thomas Hardiman, Francis Hardiman, Tawney Cutlack, William Cutlack, and their male heirs—legal male heirs.

Upon this it may be observed, that if the share of Thomas had intended to vest on the testator's *death, there would have been no con- [*567] tingency, and no difficulty in ordering that the farm should be taken as part of it, and that whatever might have been the testator's real meaning when

[1] "The principle upon which the courts, both of law and equity, act in construing wills, is to give the preference to that construction which is in favor of the vesting of the gift." Shadwell, *V. C. Butler v. Lowe*, 10 Sim. 324. And the presumption is in favor of a child's taking a vested interest. *Torres v. Franco*, 1 Russ. & M. 654.

1839.—Tawney v. Ward.

he used the subsequent words, there is no inconsistency in applying them to the event of Thomas or the other children surviving the widow.

As to the daughter's share the testator says, that he would have it secured in the funds thus:—"for my excellent trustee and friend to pay the dividends as they become due; and it is my further will that neither principal or interest of the said funds here bequeathed shall be subject to the control or debts of any husband she marries; but the same shall stand under the direction of the Court of Chancery, subject to her will only, properly executed, whether covert or sole, at her decease."

It is very improbable that the testator should intend to make the provision for his daughter (who might marry and die, leaving children in the lifetime of her mother) wholly depend on the contingency of her surviving the mother. It is more probable that the testator wholly overlooked several possible consequences of that which he was directing; and I cannot say that his having done so, and the fact that many inconveniences might have ensued from his using the words "then living," afford a reason for rejecting them, or qualifying their plain and direct meaning; and I think that I ought to declare, that according to the true intent of the will, Thomas, having died in the lifetime of the testator's widow, did not acquire any interest in the testator's estate.(a)

[*568] *July 23, 24.—Two further questions arose in this cause.

The testator, by his will, made the following direction as to the share of his daughter: "My daughter's share I would have secured in the funds thus, for my excellent trustee and friend to pay her the dividends as they become due; and it is my further will that neither principal or interest of the said funds here bequeathed shall be subject to the control or debts of any husband she may marry, but the same shall stand under the direction of the Court of Chancery, *subject to her will only, properly executed*, whether covert or sole, at her decease."

By the settlement made on the marriage of Anne Tawney, the daughter of the testator, with Mr. Proctor, dated in 1826, after reciting the title of Anne Tawney to certain other funded and leasehold property therein particularly specified; and after therein reciting, "that the said Anne Tawney would also, under or by virtue of the will of her late father, Thomas G. Tawney, deceased, become entitled, in the event of her surviving her mother, to one-third part or share, or some greater part or share, of certain personal estate and effects, and of certain copyhold estates or the value thereof in money, but that the share of the said Anne Tawney therein, was directed by the said testator to be secured in the funds thus, viz. for his trustee to pay her the dividends as they became due; and that it was his will that neither principal or interest of the said funds should be subject to the control or debts of

(a) Affirmed by the Lord Chancellor, January 1840.

1839.—Tawney v. Ward.

any husband she married, but that the same should stand under "the direction of the Court of Chancery, subject to her will only, [*569] properly executed, whether covert or sole, at her decease;" and after further reciting, that on the treaty for the said marriage, it was agreed that the other property particularly specified should be transferred to trustees, and that Thomas Proctor and Anne Tawney should enter into the covenants thereafter on their parts contained; the *other* property particularly specified was assigned to trustees, upon trust for the wife for life, for her separate use, without power of anticipation; with remainder to the children of the marriage; with remainder over. And Thomas Proctor, for himself, &c., and Anne Tawney, for herself, &c., covenanted with the trustees, that in case the said intended marriage should be had and solemnized, they would well and effectually convey to trustees "all such real and all such personal estate and effects whatsoever, other than the personal estate and effects therein before assigned and mentioned to be transferred as aforesaid, as the said Anne Tawney then was, or at the time of the solemnization of the said intended marriage might be seised of or entitled unto, or as she, or the said Thomas Proctor in her right, might, at any time or times during the said intended coverture, become seised of or entitled to, in possession, reversion, remainder or expectancy," upon trust to sell and invest the produce thereof, and stand possessed of the securities, upon the same trusts as were therein before declared of the *other* property particularly specified, thereinbefore transferred and assigned.

Two questions were raised on these instruments; first, as to the nature of the interest of Anne Tawney under the will of her father; and secondly, whether that interest was bound by the covenant contained in the settlement made on her marriage.

"On the one hand it was contended, that by the terms of the gift, [*570] Mrs. Proctor took an absolute interest in the property, which therefore became subject to the trusts of her marriage settlement; *Elton v. Shephard*(a) *Hales v. Margerum*;(b) in the former case, property being given to a *feme covert* for her separate use, and whenever she should die, to be absolutely in her own power to dispose of by will, &c., to any person, with a gift over in case of failure of appointment, it was held, that the property "was to all intents and purposes the absolute property of the married woman, as fully as any married woman could enjoy an absolute gift, and merely qualified in respect of her situation as a married woman, lest upon her death it should go to her husband." It was said that this decision was the stronger, as there was a gift over in default of appointment.

On the other hand, it was contended, that the daughter took a life interest only, with a power of appointment by her will, and that being

(a) 1 Bro. C. C. 532.

(b) 3 Ves. 299, and see *Archibald v. Wright*, 9 Sim. 161, and the cases there cited.

1839.—Taylor v. Scrivens.

settled to her separate use, it was not subject to the trusts of the settlement.(a)

Mr. *Pemberton*, Mr. *G. Turner*, Mr. *Tinney*, Mr. *Busk* and Mr. *G. Richards*, for different parties.

THE MASTER OF THE ROLLS was of opinion, that the daughter took an absolute interest for her separate use, and that, therefore, the property was subject to the trusts of her marriage settlement.[1]

[*571]

*TAYLOR v. SCRIVENS.

1839; June 6.

A check of the Accountant General was alleged to have been accidentally destroyed; the court, though not satisfied with the evidence of its destruction, directed the issue of a new check, on the ground that the other check, being more than a year old, would not be paid if presented.

IN this case it was alleged, that the Accountant General's check given to the solicitor for his costs, and dated in April, 1838, had been accidentally destroyed, and it was stated to be the practice of the Accountant General's office not to issue a second check, except authorized by the court. It was also stated to be the practice not to pay the Accountant General's checks, if more than a year old.

Mr. *Willcock* now applied to the court for an order for issuing a second check; relying on a case of *Strutt v. Finch*; (b) the application was supported by affidavits.

THE MASTER OF THE ROLLS said, that the evidence of the destruction of the check was unsatisfactory, but he should make the order, on the ground of the practice of not paying the Accountant General's checks after the expiration of a limited time.

TENCH v. CHEESE.

1839; July 17, August 7.

An exception for impertinence must be supported *in toto*, or will fail altogether.

Where, by the bill, a defendant is called upon to set forth, in the ordinary form, and without any limitation being suggested by the plaintiff, a schedule of deeds in his possession, it is not impertinent to state the names of the parties to the deeds, in addition to the dates and description of the estates to which they relate.

THIS was a case of exceptions for impertinence, taken to the further answer of the defendant Cheese, to the plaintiff's bill filed for the administra-

(a) See *Thornton v. Bright*, 2 Mylne & Cr. 254; and *Douglas v. Congreve*, 1 Keen, 423; *Graffey v. Humpage*, ante, p. 46; and *James v. Durant*, post, [vol. 2, p. 177.]

(b) L. C. 25th Nov. 1837.

[1] Vide *Murray v. Addenbrook*, 4 Russ. 418, 419, n. 1. *Cuthbert v. Purrier*, Jac. 415. *Vawdry v. Geddes*, 1 Russ. & M. 203, 208, n. 1, 3. *Green v. Spicer*, id. 395. *Blewitt v. Roberts*, Cr. & Ph. 279. *Phillips v. Eastwood*, Lloyd & G. 296. *Westcott v. Cady*, 5 Johns. Ch. Rep. 346. *Cooke v. Bowler*, 2 Keen, 54, 57, n. 1. *Lewes v. Lewes*, 6 Sim. 304, 310. *Hulme v. Hulme*, 9 Sim. 644, 650, n. 1. 2 Story's Eq. 974, a.

1839.—Tench v. Cheese.

tion of the real *and personal estate of a testator, and for the appoint- [*572]
ment of a new trustee.

By the bill the plaintiff called upon the defendant, in the usual manner, "to set forth a full and true list or schedule" of all the deeds, papers and writings relating to the matters in question which were in his possession or power.

The defendant annexed to his first answer, a schedule of deeds, making no admission as to the possession of any specific vouchers or papers, but admitting generally that he had divers papers, &c., without specifying them, which he offered to produce, alleging that they were very numerous, and could not be set out without great and unnecessary expense. This answer not being satisfactory, the plaintiff took six exceptions for insufficiency, on that as well as other grounds: one of such exceptions related to the books and papers.

The defendant put in a further answer, the schedule of deeds annexed to which occupied more than seventy brief sheets of paper, and was in the following form:—

As to all those three pieces or parcels of land, situate at A. in the county of B. July 15 and 16, 1830.—Indentures of lease and release of these dates [the release made between J. D. of C. in the East Indies, Esq., by J. H. T. of S. in the county of Middlesex, Esq., his attorney of the first part, J. S. of the city of H., Esq., of the second part, F. L. B. of the same place, gentleman, of the third part, and A. W. of L. House, in the county of Hereford, Esq., of the fourth part, and A. W. of L. House, in the county of Hereford, Esq., of the fifth part.]

*July 16th, 1830.—Bond of indemnity of this date [from the said J. [*573]
D. I. and W. W. B. of London, Esq., to the said J. S., against
Mrs. D.'s right to dower.]

The other deeds relating to the same property here followed, and were set out in the same manner.

As to the other properties, the same method was observed in the setting out the title deeds relating to them.

The plaintiff complaining that the deeds therein mentioned were described too minutely, filed exceptions for impertinence, insisting that the parts between brackets had been unnecessarily set forth, and were impertinent. The form in which the exceptions for impertinence were taken, was very similar to that in *Wagstaff v. Bryan*,^(a) namely, that from a particular word in a particular page of the office copy to a stated word in a subsequent page, the answer was impertinent.

The exceptions were 432 in number, and it appearing that about forty-six of them related to repetitions of descriptions which were contained in the schedule to the first answer, those exceptions were submitted to and allowed;

(a) 1 Russ. & Myl. 28.

1839.—Tench v Cheese.

the remaining exceptions, about 382 in number, were disallowed by the Master, and were brought before the court on exceptions to his report.

• Mr. *Pemberton* and Mr. *Beavan*, for the plaintiff.

Mr. *Kindersley* and Mr. *Heberden*, for the the defendant.

[*574] *THE MASTER OF THE ROLLS said, he would inquire as to the practice ; he had some recollection of a practice of stating in the bill the extent of discovery required, sometimes asking for the dates only, and sometimes the short material contents of the deed ; sometimes it was expressly stated that neither the contents or names of parties or dates were required to be set forth, where it was apprehended that the interrogatories, if not so restrained, would lead to a schedule like the present.

August 7.—THE MASTER OF THE ROLLS:—Upon consideration of the exceptions, and of the matter of which they complain, it appears that many of the descriptions or the deeds are unnecessarily prolix, and contain particulars not absolutely necessary for the distinct specification of the deeds, and in that sense parts of them may be considered impertinent ; but by the rule established in *Wagstaff v. Bryan*,^(a) and ever since acted upon, each exception for impertinence must be supported *in toto*, or must fail altogether ; and consequently, if any part of the matter complained of as impertinent, is not so, the whole exception fails, though some part of the matter complained of be in fact impertinent ; [1] and upon the application of this rule to the numerous exceptions in this case, the whole question is reduced to this, whether a schedule of deeds, which the defendant is called upon to set forth in the ordinary form, and without any limitation being required or suggested by the plaintiff, is impertinent, because the defendant, in describing the deeds, has, in addition to the date of the deed, and the estate or subject to which it relates,

set forth the names of the parties. The plaintiff contends, that the [*575] defendant having mentioned the estate to which the deed *relates, ought not to describe the deed otherwise than by stating the date, and that it is impertinent to add the names of the parties. The defendant insists, that in many instances, it is absolutely necessary, for the distinct specification of the deed, to name the parties, and that it is not impertinent to do so in any case.

And when the question is reduced to that which I have mentioned, I think it clear that the defendant is right. It may often happen, and there are some instances of it in this case, that there are different deeds of the same dates relating to the same property, and there are various cases, in which a sufficient specification can only be afforded by the names of the parties, and in which, for the want of names, the plaintiff might except for insufficiency.

The matter complained of in these exceptions is, in many instances, unne-

(a) 1 Russ. & Mylne, 30.

[1] That an exception should not cover too much, see further 1 Sim. & Stu. 301, n. 1 ; ante, 381. n.

1839.—Greenwood v. Wakeford.

cessarily prolix, in stating the descriptions as well as the names of the parties, and otherwise ;[1] but considering it not to be impertinent to state the names of the parties, and applying the rule laid down in *Wagstaff v. Bryan*, I am of opinion that all these exceptions must be overruled.

Exceptions overruled.(a)

*GREENWOOD v. WAKEFORD.

[*576]

1839: June 28, 29.

The trustee of a marriage settlement concurred in a breach of trust, by lending the fund to the husband on a security not warranted by the settlement: Held, that the representatives of such trustee could maintain a bill against the husband and the other *cestuis que trust*, for the restitution of the fund.

Trustees are not entitled, as against the trust estate, capriciously to refuse to continue; but if they find the trust estate involved in complicated questions not in contemplation when they undertook the trust, they have a right to come to this court to be relieved from it.

Devise by testator "of all the lands and hereditaments vested in him as trustee or mortgage in fee," held to pass trust estates vested in the testator, but not in fee.

By the settlement made on the marriage of the defendants, Mr. and Mrs. Wakeford, some freeholds and money in the funds were settled upon Mrs. Wakeford for life, with remainder to Mr. Wakeford for life, with remainder to the children of the marriage; and the settlement contained a power for the trustees, with the direction in writing of Mr. and Mrs. Wakeford, to lend the trust moneys to Mr. Wakeford, on the security of his bond alone.

The limitations of the freehold property were as follows; it was granted and released by the husband to the trustees, their heirs and assigns, to the use of the husband and his heirs until the solemnization of the intended marriage; and after the solemnization thereof, to the use of the said trustees their heirs and assigns during the life of the intended wife, upon trust to re-

[1] "The safer check against abuse in length is in costs;" Leach, V. C., *Lowe v. Williams*, 2 Sim. & Stu. 577. 10 Sim. 217, n. 1.

(a) As to what amounts to impertinence, see Pr. Reg. (Wyatt,) 383; Gūlb. For. Rom. 209; *Fenhoulet v. Passavant*, 2 Ves. Sen. 23; *Alsager v. Johnson*, 4 Ves. 217; *Coffin v. Cooper*, 6 Ves. 514; *Lord St. John v. Lady St. John*, 11 Ves. 526; *Norway v. Rowe*, 1 Mer. 347; *French v. Jacko*, 1 Mer. 357, n.; *Seeley v. Boehm*, 2 Mad. 176; *Beaumont v. Beaumont*, 5 Mad. 51; *The Earl of Portsmouth v. Fellows*, 5 Mad. 450; *Stuck v. Evans*, 7 Price, 278, n.; *McMorris v. Elliot*, 8 Pri. 674; *Parker v. Fairlie*, 1 S. & S. 295; [S. C. Turn. & Russ. 362;] *Lowe v. Williams*, 2 S. & S. 574; *Del Pont v. De Taslet*, 1 Turn. & R. 486; *Bally v. Williams*, 1 M'Clel. & Y. 334; *Corbet v. Tottenham*, 1 Ball & B. 59; *Gompertz v. Best*, 1 Y. & Coll. 114; *Wagstaff v. Bryan*, 1 Russ. & M. 28; *Anon.* 1 Myl. & Cr. 78; and see *Boames' Orders*, 69, 165; [1 Russ. & M. 30, n. 1, 31, n. 1; 1 Sim. & Stu. 301, n. 1; 2 Sim. & Stu. 577, n. 1; *Devaynes v. Morris*, 1 Myl. & Cr. 213; *Ellice v. Goodson*, 3 Myl. & Cr. 659; *Woods v. Morrell*, 1 Johns. Ch. Rep. 103, 106; *Sloan v. Little*, 3 Paige, 115; *Powell v. Kane*, 5 Paige, 265; *Ex parte Palmer*, 4 Russ., 188; *Woods v. Woods*, 10 Sim. 197, 217, n. 1; *Langley v. Fisher*, id. 345, 348, n. 1; *Attorney General v. Foster*, 2 Haro, 89, 92.]

 1838.—Greenwood v. Wakeford.

ceive the rents and pay the same to her for her separate use ; with remainder to the use of the husband for life ; with remainder to the use of the same trustees during the life of the husband, in trust to preserve contingent remainders ; with remainder to the use of the children of the marriage, with certain limitations over.

The trustees lent a part of the trust moneys to Mr. Wakeford on [*577] his promissory note, and without obtaining "the consent in writing required by the terms of the settlement. The trustees afterwards died : John Bowle was the survivor of them.

John Bowle, the surviving trustee, by his will, appointed the plaintiffs his executors ; and by a codicil, after declaring that the devise in the said will contained, of the residue or remainder of his real estate was not intended to include *any estate vested in him as a trustee or mortgagee in fee*, the testator gave and devised unto the plaintiffs, their heirs and assigns, "*all the lands and hereditaments vested in him as trustee or mortgagee in fee.*"

On the death of the surviving trustee, the trust money was still in the hands of the defendant, Mr. Wakeford ; several irregularities existed as to the trust estate, and the settlement contained no power to appoint new trustees applicable to the existing state of circumstances. This bill was filed by the executors and devisees of the will of the surviving trustee, John Bowle, to have the trust fund in the hands of Mr. Wakeford restored, for the correction of the irregularities existing as to the trust estate, and for the appointment of new trustees.

Mr. *Pemberton* and Mr. *Bird*, for the plaintiffs, contended, that the plaintiffs were justified by the state of the trust estate in coming to the court ; that the estate of the plaintiffs' testator was subject to liability ; and that it was impossible to administer that estate, until that liability had been disposed of.

Mr. *Kindersley* and Mr. *Willcock* for Mr. Wakeford, contended, that the plaintiffs had no equity, estate or interest to entitle them to support this bill ; that the testator having concurred in the breach of trust, was equally [*578] liable with the defendant, Mr. Wakeford, and, "therefore, that it was not competent for him in his lifetime, and it was not competent for his representatives now, to apply to this court to be relieved from the consequence of his breach of trust.(a) [THE MASTER OF THE ROLLS :—Can there be any doubt that if two persons concur in a breach of trust, and one alone derive the profit, the other has a right to relief against him ?] The proper remedy in this case would be on the security which the plaintiffs' testator has taken from the defendant, namely, an action to recover on the promissory note ; the plaintiffs had no right to come into equity, making the *cestuis que trust* parties.

It is attempted to sustain this bill, on the ground that it was necessary for the appointment of new trustees. If the plaintiffs are trustees, they have

(a) See *Jacob v. Lucas*, ante, 439.

1839.—*Greenwood v. Wakeford.*

no right to relieve themselves from their duties at the expense of the estate, for they might, on the death of their testator, have repudiated the trusts and disclaimed the trust estate; if they are not trustees, they have no right, as strangers, to institute a suit for the appointment of new trustees. The codicil of the testator did not pass the trust estate to the plaintiffs.

Mr. *Temple* and Mr. *Hinds*, for Mrs. Wakeford and her daughter, concurred in the opposition to the plaintiffs' bill.

Mr. *Whitmarsh*, for the co-heiresses of the surviving trustee who had been made parties.

Mr. *Pemberton* in reply, cited *Coventry v. Coventry*; (a) and see *Howard v. Rhodes*. (b)

*THE MASTER OF THE ROLLS (after stating the settlement):— [*579]
Mr. John Bowle died on the 25th of April, 1836, and the present plaintiffs becoming his representatives, had the duties and the responsibilities of their testator cast upon them. Application was made to them by Mr. Wakeford, or some member of his family, to appoint new trustees; this application necessarily induced an inquiry respecting the trust, and the consequence of that inquiry was, to find that there was nothing relating to the trust in the condition in which it ought to have been, pursuant to the deeds by which the trust was created; the consequence also was, to find that there had been various dealings with the trust property between the trustees and Mr. Wakeford, the tenant for life. It is quite unnecessary to go into a detail of the various circumstances that have happened; it is sufficient to say the trust property was very much altered in condition, and that the alteration had been made in a manner inconsistent with the trusts. From this situation of things these parties found that the estate of their testator was necessarily subject to very great responsibility: referring for instance to the one case as to the stock, as to which there was a power of advancing money to the husband upon his bond, with the consent in writing of his wife: the stock it appears had been sold out, and the produce had been advanced to the husband, without any consent in writing of the wife, and without the bond. The state of the family was, that there was one child, an infant, and the legal possibility of future issue of the marriage. The stock having been sold out for the purpose of the produce being advanced to the husband in a manner not warranted by the settlement, this infant had, beyond all doubt, a right to insist that a breach of trust had been committed, and to require the stock to be *replaced. The representatives of the surviving trustee, find- [*580]
ing themselves in this situation, were naturally desirous of relieving the estate of their testator from the responsibility which they found it thus subjected to. There was a clear demand arising from a breach of trust, in which their testator, it is true, had concurred, but in which he had concurred for the use and convenience of Mr. Wakeford, the husband. I own I am

(a) 1 Keen, 758.

(b) 1 Keen, 581.

1839.—Greenwood v. Wakeford.

rather surprised to find it alleged, even in argument, that persons placed in the situation of these plaintiffs, are not entitled to apply to this court for relief; at any moment, a bill might have been filed against them by the wife or daughter by their next friends, calling on them, as representing the estate of the testator, to replace that which had been lent to Mr. Wakeford, the husband; and I conceive it to be clear, that they had a right to proceed against the husband, for the purpose of having this matter set right. Even if the bill had been filed by the wife and daughter, and the husband together with the estate of the deceased trustee had been called on to answer the breach of trust, the estate of the deceased trustee would have had a right to indemnity from the husband. The plaintiffs finding this and the other irregularities which have been stated,—finding the trust in such a situation that it was impossible for them to clear the estate of their testator from responsibility without the assistance of this court, accordingly file their bill, stating these circumstances, and desiring to have the stock replaced; and on their motion the money is brought into court. At the time the bill was filed, the daughter was an infant; she has now come of age, and can exercise her own discretion on the subject; and the only persons now interested in the property, are the husband, the wife, and the daughter, who has now attained her age of twenty-one. Though there is a possibility of future issue in contemplation of law, yet Mrs. Wakeford is now of such an age as to make it appear satisfactorily enough that there will be no future issue, and that no further interest can arise. The wife and daughter now appear by their counsel, and do not desire these funds to be restored, the consequence of which is, that the plaintiffs are, by that act, relieved from the responsibility to which they were liable; this renders it unnecessary for them to prosecute the suit further than for the purpose of being relieved from future responsibility. In respect of the personal estate, the fund, having been brought into court, is safe, and nothing is therefore asked with respect to it. In respect of the real estate the plaintiffs still ask relief; the security for the mortgage money is vested in them, and they desire to be relieved from it; what is wanted, is somebody to whom they can safely convey that legal estate; and they have a right to be relieved from further responsibility in this respect.

With respect to the devised estates, it appears to me on the construction of the codicil, that the devisees take the legal estate:[1] they are, therefore, entitled to have somebody to whom they can safely convey it.

Then comes the question as to the costs of the suit. The opinion I entertain on this subject is this, and I have often stated it, that if a trustee undertakes the performance of a trust, he is not entitled, as against the estate he

[1] This construction seems to proceed upon the principle, that where there are inconsistent clauses in a will, the latter shall govern; as to which see *Parks v. Parks*, 9 Paige, 110. 10 Sim. 601, n. 1.

1839.—Oliver v. Burt.

has undertaken to protect, to exercise a mere caprice, and without any assignable reason say that he will no longer continue a trustee. On the other hand, if the trustee finds the trust estate involved in intricate and complicated questions, which were not and could not have been in contemplation at the time when the trust was undertaken, he has, in consequence of that change of circumstances, a right to come to the court to be relieved; and the court will judge whether the *circumstances were such as to make it [*582] fair for him to decline acting longer upon his own responsibility.[1]

There is certainly some difference between the person who has undertaken the trust and the representatives of such person; but in this case I am of opinion, that even if Mr. John Bowle had come here and had desired to be relieved from this trust, in the situation into which it had got by his acts or concurrence, but for the benefit and accommodation of Mr. Wakeford, he would have been entitled to the favorable consideration of the court in this respect. I have, therefore, no doubt about the costs in this suit. It is not fit that the trustee should have the trust estate involved in complication and difficulty for the accommodation of one of the *cestuis que trust*, and then not to be able to get relieved from it without paying the whole costs of the suit to which the same *cestui que trust* is a party resisting the relief. The bill must be dismissed with costs against the co-heiresses of the testator, to whom the legal estate would have descended if it had not passed by the devise in the codicil. I am of opinion it did pass by the codicil, but I think that it was by no means a question perfectly clear; and I therefore think it was right for the plaintiffs to bring the co-heiresses here to have it settled. The plaintiffs are entitled to have their costs, either against the fund or against the husband.(α)[2]

*OLIVER v. BURT.

[*583]

1839; June 24.

The proper mode of obtaining money out of court is by petition: but the rights of the parties having been ascertained by arbitration, and no decree having been made, the court in this case ordered payment of money out of court upon motion.

In this case a sum of money had been paid into court, and the matters in difference having been referred to arbitration, the arbitrator made his award determining the rights to the money.

There had been no decree in the cause, and

(α) By arrangement, the costs of all parties were ordered to be paid out of the trust fund.

[1] As to the resignation of trustees, see Rev. Stat. N. Y. vol. 1, (2d ed.) p. 724, § 69. 1 Keen, 760, n. 1.

[2] Vide *Fyler v. Fyler*, 3 Beav. 550.

1839.—*Fox v. Suwerkrop.*

Mr. *Cole* now applied, by motion supported by affidavits, for payment of the money out of court, relying on *Heathcote v. Edwards*.^(a)

THE MASTER OF THE ROLLS was of opinion that the proper mode of obtaining money out of court was by petition, and that it was only in a very clear case that it could be done by motion; the affidavits, however, appearing satisfactory, his Lordship, under the circumstances, ordered the payment.

FOX v. SUWERKROP.

1839; June 10.

The Master reported that a suit instituted on behalf of infants was improperly instituted, and ought not to be prosecuted: it was dismissed, with costs to be paid by the next friend.

IN this case, a bill had been filed on behalf of infants, by W. D. their next friend, and on motion made on behalf of two of the defendants, [584] it was, on the 19th of December, 1837, referred to the Master, to inquire and state to the court, whether this suit was properly instituted, and whether it would be fit and proper, and for the benefit of the plaintiffs, that this suit should be further prosecuted; and in case the Master should find that it would be for the benefit of the said infant plaintiffs, that further proceedings should be taken in this suit, then that he should inquire and state to the court, whether W. D. was a proper person to be their next friend; and if he should be of opinion that W. D. was not a proper person, then that he should approve of some other person, as the next friend of the infants, to have the conduct of this suit, in the place and stead of W. D.; and all further proceedings in this suit were stayed in the meantime.

The Master made his report, stating that he was of opinion, "that this suit was not properly instituted, and that it would not be fit or proper, or for the benefit of the plaintiffs, that the same should be further prosecuted."

The next friend took exceptions, which were overruled.

A petition was now presented by the defendants, praying that the bill might be dismissed, with costs to be paid by the next friend.

Mr. *Pemberton*, in support of the motion.

Mr. *Stuart*, contra, contended that this could not be done on petition: it would be imposing a fine on the next friend, who did not appear to have been actuated by any dishonest motives. That the proceedings [585] having already been stayed, the justice of the case would be satisfied by allowing the matter to remain as it was.

THE MASTER OF THE ROLLS:—The court has given great latitude in allowing bills to be filed in the name of infants by persons assuming the character

^(a) Jacob, 504, [and n. 1, *ibid.*] And see *Anonymous*, 4 Mad. 228. [*Hulbert v. McKay*, 8 Paige, 652.]

1839.—Fox v. Suwerkrop

of next friend, it is, therefore, the more necessary to see that this liberty should not be abused. In this case it has been ascertained that the suit has been improperly instituted, and there is no evidence of circumstances affording any excuse for its institution; I have, therefore, no hesitation in saying, that the bill must be dismissed, with costs to be paid by the next friend.[1]

[1] "It is not necessary for a person prosecuting a suit in the name of infants, to show that the suit was commenced with their knowledge, or consent. Any person may bring a suit in their name, as their next friend, because he does it at his peril. The only check upon this general license is, that on a proper application the court will refer it to a Master to inquire whether such suit is for the benefit of the infants; and if the Master reports that it is not for their benefit, or that it is not for their interest that it should be prosecuted by a particular person who has instituted the suit, the court will order the proceedings to be stayed. In this respect it differs from a suit brought in the name of a *feme covert*. Such suit cannot be brought without her consent; and when brought with her consent, the *prochein ami* may be changed on her application, the person substituted giving security for the costs already accrued." Walworth, Ch., *Fulton v. Roosevelt*, 1 Paige, 179. "You may," says Lord Langdale, "in the character of next friend of an infant, prosecute a suit on his behalf without his consent, and even against his strongest remonstrances; subject only to such inquiries as this court in a proper case will direct, whether it is prosecuted for the benefit of the infant; but I have never before heard that a person can treat a married woman, and a married woman of full age too, as if she were possessed of no sense or understanding, and can say that he will proceed with a suit on her behalf without her approbation." *Cooke v. Fryer*, 4 Beav. 16. The principles upon which the court will judge of the propriety of a suit brought by a next friend, have been fully discussed by Lord Brougham; who, after adverting to the great encouragement held out to next friends by the language of judges, expressed his own opinion as follows:—"The true and just principle which should govern all such cases is this: no discouragement should be thrown in the way of persons *bona fide* suing as next friends; but no undue facility should be given to mere volunteers, who interfere rather for their own purposes than for the infant's advantage. While they appear to act *bona fide* they will be protected; the presumption will rather be in their favor; the proof will rather be thrown upon those who impeach their motives; the leaning will be more for than against them. But no strained presumptions will be made to protect them; no forced constructions will be put on their conduct; no benefit from bare possibilities will be conjured up in their behalf. They must be content to have their motives appreciated, and their acts judged like other parties. If they have involved themselves in suspicion, their proceedings must be subjected to inquiry; if they have incurred just blame, be it by improper interference, or be it by unnecessary interference, they must abide the consequences; the suit at their instance must be stayed; or if the suit be useful to the infant, but the parties instituting it be unfit to conduct it, they must give place to others in whom the court can better repose confidence. It follows that every such case must depend upon its circumstances; nor will the court even order an inquiry unless just cause of suspicion exists." *Nalder v. Hawkins*, 2 Myl. & K. 243, 249. See further the next case. *Macpherson on Infants*, 363, 370. The court will not remove a next friend because he is nearly related to, or connected with the defendant; but it must see that there is a probability that the infant's interest will be prejudiced, if the next friend is allowed to remain. *Bedwin v. Asprey*, 11 Sim. 530. As to next friend of *feme covert*, see further *Pennington v. Alvin*, 1 Sim. & Stu. 264. *Greenaway v. Rotherham*, 9 Sim. 88. When next friend of infant or *feme covert* will be required to give security for defendant's costs, see *Fulton v. Roosevelt*, *ubi supra*. *Pennington v. Alvin*, *ubi supra*, and *Ibid.* 265, n. 1. As to inquiry where suits have been commenced by different next friends of an infant, which is most beneficial; see *Macph. on Inf.* 371, 374. *Taylor v. Oldham*, Jac. 527, 529, n. 1. As to a *special* next friend, for the purpose of an application in reference to the *general* next friend, see *Guy v. Guy*, 2 Beav. 460. As to infant plaintiff attaining full age, *pendente lite*; *Ibid.*

 1839.—Sale v. Sale.

ORDER.

His Lordship doth order, that the plaintiffs' bill do stand dismissed out of this court, and that W. D., the next friend of the plaintiffs, do pay to the defendants their costs of and occasioned by this suit, and of and occasioned by the application of the 19th day of December, 1837, and the reference thereby directed, and of this application and consequent thereon, to be taxed by the Master.

[*586]

*SALE v. SALE.

1839: July 22.

In a clear case, the court, being of opinion that a suit had been commenced by the next friend of infants to promote his own views, and not for the benefit of the infants summarily, and without a reference to the Master, dismissed it with costs to be paid by the next friend.

THIS was a motion made on behalf of a sole defendant, that the bill, which had been filed in the name of infants by a next friend, might be dismissed or taken off the file, with costs to be paid by the next friend personally, or for a reference to the Master to inquire, whether it had been brought for the benefit of the infants and was proper to be prosecuted.

The application was supported by affidavits.

Mr. *Pemberton* and Mr. *Purvis*, in support of the motion, asked, that as the facts appeared clear on the affidavits, the bill might be dismissed at once with costs, as in cases of this sort great expenses were incurred, first, in the preliminary discussion before the court in obtaining the reference, secondly, in the proceeding before the Master, and ultimately, in the discussion in court upon the application to confirm the Master's report, yet all these discussions usually proceeded on the same facts.

Mr. *Cooper* and Mr. *Stinton*, for the next friend, contended that this was not a case in which the summary jurisdiction of the court ought to be exercised on motion, either by staying the suit or by reference to the Master.

THE MASTER OF THE ROLLS :—I am perfectly aware how constantly this court has thought it right, and how necessary it is, to protect persons who file bills in equity for the benefit of infants; it is quite necessary that [*587] *proper suits should be protected; but in proportion as it is necessary to protect suits of that sort, it is necessary to take care that crafty persons do not take advantage of the privilege and file bills purely for their own benefit, and purely for the purpose of creating costs for the benefit of no one concerned in the cause. [His Lordship then went through the facts of the case, and came to the following conclusion.] I have never seen an attempt more crafty and at the same time more coarse to defraud infants. I am perfectly satisfied that this suit is filed not for the benefit of the infants, but to promote the views of the person who styles himself the next friend of

1839.—Trevelyan v. White.

the infants, and that being so, I apprehend there can be no doubt of the jurisdiction of this court, and that it ought to be exercised in such a case as this.

It matters little what the nature of the suit is; when a party comes here using the privilege of acting on the behalf and as the next friend of infants, it is his bounden duty to show, that he really acts for the benefit of the infants, and not to promote purposes of his own. This bill must be dismissed with costs to be paid by the next friend.[1]

*TREVELYAN v. WHITE.

[*588]

1839: April 12, 22.

A decree was made against A. B., setting aside, as fraudulent, a purchase by an agent from his principal; and a reconveyance, and the usual accounts of rents and purchase money were directed, in which an allowance was to be made for substantial repairs and lasting improvements. A. B. sold and conveyed part of the property, *pendente lite*, and died before the accounts were completed; a supplemental bill was filed against the purchasers, and the heir and personal representatives of A. B.; the bill charged that the purchasers, in case of eviction, claimed compensation out of the estate of A. B. The conveyances, *pendente lite*, being set aside: Held, that the purchasers were entitled in this suit, as against their co-defendants, the personal representatives of A. B., to an order for the repayment of their purchase money, and were entitled as against the plaintiff to an allowance for substantial repairs and lasting improvements, but that no greater relief could be given them in this suit. Held, also that the heir and personal representatives were proper parties to the supplemental bill.

THE facts and arguments in this case appear in his Lordship's judgment. Mr. Pemberton, and Mr. S. Sharpe, for the plaintiff.

Mr. Treslove, contra, for the defendants White and Major.

Mr. Swanston, Mr. G. Richards, Mr. Kinglake and Mr. F. Goldsmid, for the other defendants.

The cases cited were, as to a purchase *pendente lite*, *Sorrell v. Carpenter*.(a) As to accounts between co-defendants, *Latouche v. Lord Dunsany*.(b) and *Chamley v. Lord Dunsany*;(c) and that a plaintiff has no right to make a person a party to a suit unless he can obtain a decree against him, *Petch v. Dalton*.(d)

April 22.—THE MASTER OF THE ROLLS:—On the second day of May, 1788, the late Sir John Trevelyan, conveyed certain estates to James Charter, who afterwards conveyed the same to Thomas Charter, [*589] from whom they descended to Thomas Malet Charter.

In 1827, Sir John Trevelyan alleged that the conveyance had been ob-

(a) 2 P. Williams. 482.

(b) 1 Sch. & Lef. 137.

(c) 2 Sch. & Lef. 690; and see *Eccleston v. Lord Skelmersdale*, ante, p. 396.

(d) 8 Price, 12.

[1] Vide the preceding case.

1839.—Trevelyan v. White.

tained from him by the fraud of Thomas Charter; and he filed his bill to be relieved, and to have a reconveyance from Thomas Malet Charter.

The suit having abated by the death of Sir John Trevelyan, was revived by his son Sir John Trevelyan, the plaintiff in this cause; and by the decree, dated the 2d of June, 1835, it was declared, that the conveyance of the 2d day of May, 1783, was fraudulent, and ought to be set aside; and the plaintiff undertaking to confirm any sales made before the filing of the original bill, an inquiry was directed what part of the estates had been sold, and to whom, and for what; and Thomas Malet Charter was directed to reconvey to the plaintiff such parts of the estates as had not been sold; an account was then directed to be taken of rent and of purchase money received by the Charters, and of purchase money paid to Sir John Trevelyan, and of money expended for substantial repairs and lasting improvements, paid by them; interest was to be charged, and annual rests were to be made in taking the accounts, and either party was to pay the other what should be found to be due.

After this decree was made, Thomas Malet Charter died, leaving Ellis James Charter his heir at law; and the suit was revived against the persons entitled to his real and personal estate, and the accounts are in course of prosecution.

In this state of things a supplemental bill is filed against John [*590] White and James Major, and persons *interested under them, alleging, that after the suit was instituted, White took a conveyance of part, and Major a lease of other part of the property in question, from Thomas Malet Charter, and praying that such conveyance and lease may be declared to be void, and that the instruments may be delivered up to be cancelled, or that the parties may reconvey; and further praying that all necessary accounts may be taken, and that the bill may be taken to be a supplemental bill to the original bill against Thomas Malet Charter, and the bill of revivor and supplement against the persons entitled to his real and personal estate.

To this bill, not only the purchasers and their incumbrancers, but also the representatives and persons entitled to the estate of Thomas Malet Charter, are made parties.

The purchasers object to the evidence, as not sufficiently proving that the lands purchased are part of the lands comprised in the fraudulent conveyance obtained by Thomas Charter from Sir John Trevelyan. On the whole, I think that the evidence is sufficient; and if it be so considered, it is admitted that the defendants, the purchasers, have no defence against the plaintiff's demand; and they insist, that they are entitled in this suit to be indemnified out of the estate of Thomas Malet Charter, as against their co-defendants. On the other hand the defendants, who are interested in the estate of Charter, insist that they ought not to be parties to this suit at all; and although they have taken no objection by their answer, they insist that the bill ought

1839.—Trevelyan v. White.

to be dismissed, as against them. They allege, that it was not necessary or proper to make them parties to a proceeding, instituted for the purpose of establishing a clear and undoubted right against the purchasers; that *the purchasers are entitled to no relief against them, and that [*591] they cannot be required to indemnify the purchasers in this suit.

At the time when the original suit was instituted, the legal estate in the lands which are in question in the supplemental suit was vested in Thomas Malet Charter. By the decree he was ordered to convey the same lands, and to account to the plaintiff for the rents thereof which he had received.

By the transfer which he had made, *pendente lite*, he had disabled himself from obeying the decree. If his act in this respect had been known before the decree, the purchasers might have been made parties to the original suit, and suitable relief would have been given by the decree: Mr. White would have been ordered to reconvey the estate conveyed to him, Mr. Major and Mr. Charter would have been ordered to reconvey the demised estate, and Mr. Charter might have been ordered to account for the rent which he might have received if he had not executed the conveyance and lease.

The plaintiff, either not knowing of the transactions, or not choosing to delay his suit, by bringing the purchasers before the court previously to the hearing, obtained his decree against Mr. Charter, and revived it against Mr. Charter's representatives, without making the purchasers parties; but he was entitled to the benefit of the decree against the purchasers *pendente lite*, and it was only by filing his bill against them, that he could obtain a reconveyance, and get back the lands leased to Major. I conceive that Ellis James Charter, to whom the estate of Thomas Malet Charter has descended, ought to join in the reconveyance with Major and those *claiming [*592] under him; and that for the purpose of obtaining such joint reconveyance, Ellis James Charter is properly made a party to this suit.

And considering the nature of the original suit, and of the decree therein made, that accounts are pending which may lead to and require an account of the assets of Thomas Malet Charter, that in this suit the plaintiff appears to me to be entitled to an account of the rents of these estates, which Thomas Malet Charter, or those claiming under him, might have received if the lands had not been sold or leased, I think that the personal representatives of Thomas Malet Charter are also proper parties to this suit.

I have more difficulty in determining what relief can be afforded to the purchasers in this suit. The bill expressly charges, that they claim compensation :(a) to this charge no defence is made, and I apprehend it to be clear, that they are entitled to compensation in some form or other. If they ask from Charter's estate no more than repayment of the purchase money, and

(a) "Charges that John White claims, in case he shall be evicted from the property comprised in the before mentioned lease of the 7th July, 1828, to have an adequate recompense and compensation out of the assets of said Thomas Malet Charter, for all loss, injury and damage which shall, by reason of such eviction, be sustained by him."

 1839.—Whittem v. Sawyer.

obtain from the plaintiff an allowance for substantial repairs and lasting improvements, I incline to think that relief may be given in this suit; if more is asked, I am afraid that assistance cannot be given here.[1]

[*493]

*WHITTEM v. SAWYER.

1839: August 6, 7.

A wife established her right to a settlement, as against her husband's assignees, to the extent of one-half of the fund: Held, that she could not afterwards waive the making of the settlement so as to defeat the rights of her children.

In this case Mr. Parker, a bankrupt, in right of his wife was entitled to trust funds, which were the subject of this suit. Mrs. Parker insisted on her equity to have a settlement as against the assignees of her husband, and it was arranged that half the funds should be conceded by the assignees for that purpose.

On settling the minutes of the decree,

Mr. *G. Turner*, in behalf of the wife, submitted that she could now waive her right to have the sum settled, and he proposed that it should be carried over to the joint account of the husband and wife: he cited *Fenner v. Taylor*, (a) *Murray v. Lord Elibank*, (b)

THE MASTER OF THE ROLLS thought that the agreement enured for the benefit of the children of the marriage, and that the wife could not waive the settlement, but said he would look into the cases cited.[2]

(a) 2 Russ. & Myl. 190. [reversing the decision of the Vice-Chancellor, S. C. 1 Sim. 170.] See *Groves v. Clarke*, 1 Keen, 132; *Lloyd v. Williams*, 1 Mad. 450; *Steinmetz v. Halkin*, 1 Gl. & J. 64.

(b) 10 Ves. 84, and 13 Ves. 1.

[1] As to purchase *pendente lite*, see *Murray v. Lylburn*, 2 Johns Ch. Rep. 441. *Turner v. Wight*, 4 Beav. 40. As to decree for defendant against co-defendant, see *Goodwin v. Clewley*, 2 Beav. 30, and note, *ibid*.

[2] This *dictum* (for by the disposition made of the case in the next paragraph, it does not clearly appear to have been more than such,) of the Master of the Rolls, seems irreconcilable with the decision of Lord Brougham in *Fenner v. Taylor*, 2 Russ. & M. 190. In that case, a husband, whose wife was entitled to a fund in court, signed a memorandum after marriage, agreeing to secure half her property on herself; and it was held that it was competent for the wife to waive this agreement, and that any benefit that her children might have taken under it was defeated by her waiver. The same doctrine was recognized by Lord Cottenham in *Hodgens v. Hodgens*, 11 Bligh, 104. Mr. Justice Story says, 2 Equity Jurisprudence, § 1417: "The wife's equity for a settlement is generally understood to be strictly personal to her; and it does not extend to her issue, unless it has been asserted and perfected by her in her lifetime. If, therefore, she should die, entitled to any equitable interest, and leave a husband, and her children are unprovided for by any settlement; still, her husband will be enabled to file a bill to recover the same, without making any provision for the children. In truth, the equity of the children is not an equity, to which, in their own right, they are entitled. It cannot, therefore, be asserted against the wishes of the wife, or in opposition to her rights. The court, in making a settlement of the wife's property, always attends to the interests of the children; because it is supposed that in so doing, it is carrying into effect her own desires to provide for her offspring. But if she dissents, the court withholds all rights from the children."

1839.—Bierderman v. Seymour.

THE MASTER OF THE ROLLS, after referring to *Barker v. Lea*,^(a) held that there must be a reference to the Master, to approve of a proper settlement of the fund.

*BIERDERMANN v. SEYMOUR.

[*594]

1839: July 1.

It is the duty of a plaintiff to come fully prepared at the hearing, to ask the court for a decree; and if he is not so prepared, and the suit appears defective from his default, it is then a matter of discretion or indulgence to grant him leave to supply the defect.

A cause came on, and was ordered to stand over for want of parties; it was brought on a second time, when the allegations and statements in the bill were found so defective, as to prevent the court making a decree, and the suit was again defective for want of parties; the court gave the plaintiffs leave to set the record right, but only on the terms of their paying the defendants the costs of the former and of the present hearing.

THE bill was filed in 1833, by the legal personal representatives of the testator, J. W. Bierdermann, (one of whom was his heir,) and was amended in 1834. It stated certain specific bequests, made to the defendant, Louisa Ann Seymour, and her children, by the will of the testator, dated in 1825, and a codicil dated in 1827. The bill then stated, "that the said testator made and published a second codicil to his said will, bearing date the 5th of February, 1834, but it was not material to set forth any part of the same;" and it then proceeded to allege, that the defendant Louisa Ann Seymour had, without the assent of the plaintiffs, taken possession of the articles specifically bequeathed to her, and "the whole of the aforesaid particulars being liable to pay and satisfy the said testator's debts," they had applied, but in vain, to her to give up the same to plaintiffs. The bill prayed an account of the personal estate and effects of the testator which had come to the hands of the defendant Louisa Ann Seymour, or of any person by her order or for her use, and that she might be compelled to account for the same; and, if requisite, that the usual accounts might be taken of the testator's personal estate, the plaintiffs offering to come to all proper accounts.

The cause came on for hearing in May, 1835, when it was ordered to stand over, with liberty for the plaintiffs to amend their bill, by adding parties as they might be advised. The plaintiffs amended, but finding that they had not then brought all the necessary parties before the court, [*595] they obtained liberty from the Lord Chancellor, again to act on the leave to amend, by adding the parties so omitted.^(b) The plaintiffs amended their bill, by introducing the following statement after the recital of the will and codicils; viz.: "That the said will and codicils were executed to pass real estate, and the same contained devises of real estates of which the testator was seised, and charges upon the same, which, as plaintiffs are advised, it is

^(a) 6 Mad. 330.^(b) 2 Myl. & Cr. 117.

 1839.—Bierdermann v. Seymour.

not material to set forth, as by the said will and codicils or the probate thereof, and which for greater certainty plaintiffs refer, when produced, will appear.' The plaintiffs also added several persons as parties defendants, some of whom were legatees, and the others were described in the bill in these words: "The said other defendants are devisees under the said testator's will, who, it is insisted, are interested in and are necessary parties to this suit."

The defendants including L. A. Seymour, by their answer stated, that the testator's will was executed in the manner required by law for the devise of real estates, and that the testator signed such paper writing as in the said amended bill was called a second codicil to his said will, but that they did not know whether testator was competent to make such codicil. The answer further stated, that the testator was, at the time of making his will, and also at the time of his death, seised of real estate of considerable value, part of which was devised by his will subject to the payment of certain specified debts, and that other part thereof descended upon the plaintiff George A. Bierdermann, his heir at law, but subject to the payment of certain specified debts charged thereupon by the will; and the defendants by their [*596] answer submitted, that the testator's specialty debts *ought to be satisfied by the plaintiff George A. Bierdermann, out of the real estates descended upon him, in case of a deficiency of the general personal estate, and that the debts specifically charged upon the real estates ought to be paid thereout, and not out of the personal estate specifically bequeathed; and that all the specific legatees should contribute to make good any deficiency, and that all proper parties should be brought before the court for a proper administration of the testator's real and personal estate in manner aforesaid.

The cause now came on again for hearing, when

Mr. *Pemberton* and Mr. *Cankrien* objected, that the bill ought to have been framed with a view to obtain a decree to establish the will and to have the trusts carried into effect; that the specific legatees ought not to be called on to contribute, until the debts payable out of the real estates had been satisfied; that no decree could be made upon the present bill, framed as it was; and that as some of the defendants disputed the competency of the testator to make the second codicil, (which it would be seen, when brought before the court, affected the question, how far the debts were payable out of the real estates in exoneration of the personal estate specifically bequeathed,) the plaintiff ought to file a supplemental bill and establish the second codicil; that it was, therefore, useless to allow the present suit to proceed, and that the court ought to dismiss it, allowing the plaintiffs, if they pleased, to commence *de novo*; or, at all events, the defendants ought to be paid the costs they had been put to by the plaintiffs' wilful neglect, in not putting the record into a proper state.(a)

[*597] *Mr. *Cooper* and Mr. *Dixon*, for the plaintiffs, submitted that

(a) *Tyler v Bell*, 1 Keen, 826; 2 Myl. & Cr. 89, was referred to.

1839.—Bierdermann v. Seymour.

the court ought not to put the plaintiffs to the useless expense of commencing entirely *de novo*; but, if necessary, should give them an opportunity of putting the present suit into a proper state; that the second codicil, as well as the will and first codicil, had been proved in the Ecclesiastical Court, and that therefore the defendants could not dispute it as to the personal estate; that the defendants did not expressly deny its validity as to the real estate, but only stated, they did not know whether the testator was competent at the time it was signed by him.

THE MASTER OF THE ROLLS:—It appears to me to be clear, that this suit is defective for want of parties, and considering what has been stated, the interests of the parties, and the questions which may arise, I am of opinion that the bill does not contain such statements and allegations as are necessary to enable the court to carry the will duly into execution; nevertheless, from the statements which are now made, it appears that there are serious questions, which may arise between these parties; and I should, therefore, be very reluctant to deprive them of any benefit, which may be derived from the proceedings which have already taken place.

With respect to giving leave to amend, my opinion is the same as it was in the case referred to of the demurrer. It is the duty of a plaintiff to come fully prepared to ask the court for a decree; and if he is not so prepared, and it appears that the suit is defective from his default, then I think that it is, what is usually called, an indulgence to give the plaintiff leave to supply that defect afterwards; it becomes the duty of the court to consider whether, for promoting the ends of justice, leave should be given or not. I do not think it is a *right which the plaintiff can demand of the [*598] court; but if he offers good reasons why this indulgence should be granted, then it is the duty of the court to grant it: but if no good reasons are shown, then it is equally the duty of the court to refuse the application.

Now this case has twice come on for hearing, and has, on both occasions, been defective for want of parties; yet it is a case in which probably some advantage may be taken of the proceedings which have taken place, and of the answers which have been put in. One of two courses must be adopted, either this suit must be dismissed altogether, giving the plaintiffs leave to commence *de novo*, or the plaintiffs may have leave to put this suit into a proper state, making amends, as far as they can, for the inconvenience and expense which the defendants have been put to by the former imperfections of this suit. On the whole, I think the plaintiffs must pay the defendants the costs of the original hearing, and those which have been occasioned by the present hearing; but, at the same time, I think I ought to give them leave to put this suit in a proper state, either by amending it or by filing a supplemental bill.

1839.—Field v. Hutchinson.

[*599]

*FIELD v. HUTCHINSON.

1839 ; July 25.

Where the want of signature to an agreement for the sale of lands clearly appears on the bill, the objection may be taken advantage of by general demurrer ; but the statements of this bill not being inconsistent with a signature by the party to be charged, and containing allegations of part performance, a general demurrer thereto was overruled.

THIS was a bill for the specific performance of agreements for granting a lease of certain premises ; the bill stated that the agreements, in which the defendant's name occurred, (a) were written in the handwriting of the defendant : and that the agreement had been part performed.

The defendant filed a general demurrer to the whole bill.

Mr. *Bird*, (in the absence of Mr. *Pemberton*,) in support of the demurrer, amongst other objections, contended that it did not appear, on the face of the bill, that the contract was signed as required by the statute of frauds.

Mr. *Kindersley* and Mr. *Thomas Turner*, contra, on this point, contended that the objection, for want of signature, could not be taken by general demurrer, for a contract, though not signed, might under a variety of circumstances be valid in equity ; and that this species of defence must be raised either by plea or answer.

Mr. *Bird*, in reply.

THE MASTER OF THE ROLLS (after disposing of the other points):—It is said that it does not appear, from the record, that the agreement was signed in the manner required by the statute of frauds. It is not distinctly alleged on the record, but the statements are quite [*600] consistent with there being a sufficient signature by the party to be charged.

There can be no doubt but that a bill may contain such statements as to entitle a defendant, by general demurrer, to take advantage of the want of signature, because it might appear clear that the plaintiff was not entitled to the relief he asked. All that is necessary to say in this case is, that although some part of the relief sought by this bill cannot be granted, and that some part is doubtful, yet it appears, from the statements, that there is some relief which, if the allegations should be then proved, will be granted at the hearing.

Demurrer overruled.

(a) See *Knight v. Crockford*, 1 Esp. 189 ; *Saunderson v. Jackson*, 2 Bos. & P. 238.

1839.—Poole v. Pass.

Between C. POOLE, Plaintiff, and W. PASS, Defendant.

1839; June 17.

A mortgagee, in whom a satisfied mortgage term was vested, held, under the circumstances, bound to assign it to the trustee of the will of the mortgagor, without the concurrence of the parties beneficially interested in the property under the will.

A testator allowed a satisfied mortgage term to remain outstanding in the mortgagee, and he devised the estate to a trustee in such a manner as, in the opinion of the court, to entitle him to call for an assignment of the term without the concurrence of the parties beneficially entitled; the termor, under the advice of counsel, refused to assign without such concurrence, and a suit became necessary to compel him: The court, though of opinion that the termor was not entitled to insist on his objection, gave him his costs, charges and expenses.

THE testator in 1822, mortgaged his moiety of an estate at Timperley to the defendant, William Pass, by demise for 1000 years.

The mortgage money was repaid, but no reconveyance was executed, the testator having, as was stated by the answer, declined to take the same.

"The testator by his will, after "directing all his just debts, funeral [*601] and testamentary expenses to be paid and discharged by and out of his estate and effects," gave the moiety of the freehold property at Timperley and his leasehold for lives at Bowden and elsewhere to the plaintiff, his heirs and assigns, upon trust to pay the rents thereof to his wife during the minority of his son John; and after his attaining twenty-one years, he gave his wife an annuity of 40*l.* a year, and he charged all his real and leasehold hereditaments with the payment thereof, and he gave her a power of distress for the same; and subject thereto, he devised his freeholds and leaseholds in manner hereinafter particularly mentioned. And he directed his trustee, when and as soon as his son John should attain the age of twenty-one years, to cause a valuation to be made of his estates, which were to be allotted in three separate shares, and were to be divided amongst his children, John, Peter and Mary Ann; and it was his will and mind that his son John should take the first refuse of his leasehold at Bowden and his freehold at Timperley; and that his son Peter should take such of the two estates as should remain; "and according to such choice made by his said two sons, he gave and devised the same estates to each of them severally, their respective heirs and assigns," for ever: and he appointed the plaintiff and his son John executors.

The testator died in 1832, and (as was stated) his son John attained twenty-one about September, or October, 1834, but had not made his election between the two estates.

After the death of the testator, the plaintiff was desirous of having the term of 1000 years surrendered and assigned to him, and the defendant claiming no *interest in it, was willing to execute such assignment [*602] as proposed by the plaintiff; but reference being made in the draft assignment to the testator's will, it was referred to by the defendant, who then had some doubt as to its effect, and in December, 1834, objected to exe-

1839.—Poole v. Pass.

cute the assignment without the concurrence of the *cestuis que trust*, alleging, that "the devise upon trust of the testator's estate to his trustees was only co-equal to the minority of his son John, and that upon his attainment to the age of twenty-one years (which event he understood had happened,) the Timperley estate was devised over to one of the two sons in fee; that this would have the effect of vesting the estate in the son, and that the term of years affecting it, must remain subject to his direction;" and further that the deed prepared would not have the effect of merging the term.

To this it was replied, that the son John not having made his choice under the will, the trustee was competent to receive a surrender.

A controversy then took place between the parties, and they both consulted conveyancers of eminence on the point, who differed in opinion; the gentleman consulted by the plaintiff being of opinion that the assignment might safely be made without the concurrence of the *cestuis que trust*, while on the other hand, the defendant's conveyancer, though concurring that the plaintiff took the legal estate in fee simple, was of opinion, that the defendant would not be justified in assigning or surrendering the term by the direction of the trustee under the will, without the concurrence of the parties beneficially interested; he added, "that in the case of a devise unto and to the use of the trustee and his heirs, in trust for A. and his heirs, he apprehended it [*603] would be clear, that the trustee of a prior satisfied term would "not be justified in dealing with the term without the concurrence of A."

The defendant then proposed to have the draft settled by a third counsel, but this offer was not accepted, and in April, 1836, this bill was filed to compel the defendant to assign the term and to pay the costs.

Mr. *Pemberton* and Mr. *Kenyon Parker*, for the plaintiff. The question is, whether, where an estate is devised to trustees who have the absolute estate, a mortgagee who has been paid, and is therefore a trustee, can refuse to surrender the term without a suit in chancery. The conveyancer consulted by the defendant could not have been aware that infants were interested in the estate, and that it would be impossible for them to join; that there must be a decree is clear, and the defendant ought to be ordered to pay the costs which have been wantonly occasioned. *Angier v. Stannard*(a) shows, that at any rate, he is not entitled to his costs.

Mr. *Tinney* and Mr. *G. L. Russell*, for the defendant. The defendant does not object to assign the term as the court may order; but being a trustee, he is entitled to his costs. It was by the desire of the testator himself that the term was not assigned; it is no longer a mortgage term, but an attendant term, and the defendant would not be justified in merging the term, or in dealing with it, without the concurrence of the parties beneficially interested under the will of the testator; it [*604] "would prejudice them, and be a breach of trust, for which the defendant might incur liability; the cause ought, therefore, to stand over

(a) 3 Myl. & K. 566.

1839.—Vance v. Vance.

to make the *cestuis que trust* parties to it. This case is distinguishable in its circumstances from *Angier v. Stannard*. They also cited *Calverley v. Phelps(a)* and *Osborn v. Fallows.(b)*

Mr. *Pemberton*, in reply, contended that the fact of the real estate being charged with debts was of itself sufficient to justify the trustee and executor in calling upon the defendant to convey the legal estate.

THE MASTER OF THE ROLLS (after stating the mortgage, the will and the subsequent circumstances) said, I must say, under these circumstances, the defendant is entitled to be paid his costs of this suit; and it appears to me on the whole, that the plaintiff has a right to have this term surrendered; he has trusts to perform under this will, which require that he should have dominion over the legal fee of this estate. I do not at all agree in the argument which has been offered on behalf of the defendant, that he is to look to the trusts: the proper question for him to ask himself is, whether he will be exposed to any risk in doing what is required, and it is only necessary for him to see that he does not endanger his own safety. It appears to me that there are things to be done which entitle the plaintiff to have this term surrendered to himself; that being so, a decree must be made for the plaintiff, and he must pay the defendant the costs of this suit.[1]

Mr. *Tinney*. As trustee he will have trustee's costs, as between solicitor and client, and the costs of the opinion taken.

*THE MASTER OF THE ROLLS:—Yes; I think no trustee would [*605] be safe unless such costs were allowed.(c)

VANCE v. VANCE.

1839: July 30.

A. B. gave directions to his bankers to invest a sum of money in the joint names of himself and wife, and their brokers accordingly made the purchase: A. B. died after the contract, but before the transfer had been completed: Held that the wife was entitled to the stock by survivorship.

ON the 22d of March, 1837, the intestate, George Vance, being confined to his bed by an accident which afterwards occasioned his death, signed an order on his bankers, Messrs. Coutts & Co., in the following form:—

(a) 6 Mad. 229.

(b) 1 Russ. & Myl. 741.

(c) The defendant was decreed to execute to the plaintiff, or as he should direct, a surrender or assignment of the term, and the Master was ordered to tax the defendant his costs of this suit, as between solicitor and client, and to tax him his charges and expenses, properly incurred, to be paid by the plaintiff.—Reg. Lib. B. 1838, fol. 965.

[1] Where parties call on trustees to part with their estate on the ground that 'their trusts have terminated, they are bound clearly and satisfactorily to show the fact to the trustees. *Holford v. Phipps*, 3 Beav. 434. Trustees of a term, the trusts of which had been put an end to by the *cestui que trust*, were held entitled to their costs of a suit to compel an assignment of the term to the purchaser of the property, on the ground that full and accurate information had not been tendered them before the bill was filed. *Ibid*.

1839.—Vance v. Vance.

"Gentlemen,—Be so good as to buy a thousand consols for me and my wife, 'old account.' I am your obedient servant."

Having signed this order, he desired that it should be sent, on the ensuing day, to Messrs. Coutts & Co.

Mrs. Vance kept the order in her possession, and from the distress of mind under which she at the time labored, did not send the order the following day, nor on the next succeeding day (being Good Friday;) but the order [*606] was forwarded, on Saturday the 25th of *March, to Messrs. Coutts & Co., who acted on it, and sent to the intestate the following letter:—

"*Strand, London, 25th March, 1838.*

"Sir,—According to your direction, our broker has purchased 1000*l.* consolidated 3 per cents. at 90½ for

					£904	10	0
Brokerage	-	-	-	-	1	5	0
					<hr/>		
					£905	15	0
					<hr/>		

To be transferred into the joint names of yourself and Mrs. Vance on Tuesday next, when the cost will be charged to your account."

The intestate died in the evening of Monday, the 27th of March, 1837.

On Tuesday, the 28th of March, 1837, the sum of 1000*l.* consols was transferred into the joint names of the intestate and his wife; and on the same day the sum of 905*l.* 15*s.* was charged by Messrs. Coutts & Co. to the account of the intestate.

The question was, whether this sum belonged to the estate of the intestate, or to the widow on the trusts of the "old account."

Mr. *Skirrow* and Mr. *E. J. Lloyd*, for the plaintiff, submitted the point to the court.

Mr. *H. W. Clarke*, for the widow of the intestate.

THE MASTER OF THE ROLLS said he thought there was enough [*607] to entitle the widow,—that there was an order *given by the intestate to his bankers, which had been acted on by them by making a contract, after which the intestate could not alter it.[1]

[1] Vide *Dummer v. Pitcher*, 2 Myl. & K. 262. *Shuttleworth v. Greaves*, 4 Myl. & Cr. 35. *Searing v. Searing*, 9 Paige, 283.

1839.—Walker v. Moore.

WALKER v. MOORE.

1839 ; June 25.

A testator bequeathed the residue amongst his five grand-children, A., B., C., D. and E., his grand-son A.'s two children, F. and G., and his niece's two children, H. and K. ; and declared that " in case any of the said last mentioned children should die before their attaining their respective ages of twenty-one and should leave no lawful issue, then the survivors were to have his or her share." F., died under twenty-one, and left no issue : Held, that his share became divisible between the eight surviving legatees, children and grand-children.

THE testator by his will expressed himself as follows :—

As to all the rest, residue and remainder of my property, and which I shall be entitled to at the death of my wife, I give, devise and bequeath the same to be divided equally, share and share alike as tenants in common and not as joint tenants, amongst my five grand-children, William Moore, Thomas Moore, Clement Moore, Henry Moore and Joseph Moore, my grand-son William Moore's two children, Elizabeth Moore and William Moore, and my niece Rachael Walker's two children, Robert Moore Walker and Esther Walker ; and in case any of the said *last mentioned children shall die* before their attaining their respective ages of twenty-one years and leave no lawful issue, then *the survivors to have the share* or shares of him, her or them so dying, equally divided amongst them, share and share alike.

William Moore, the son of the testator's grand-son William Moore, died under twenty-one without issue, and the question was, whether his one-ninth became divisible, and amongst what "survivors."

It was submitted, first, that the share was not divisible ; and secondly, that the five grand-children first mentioned did not participate in his share.

*Mr. Walker, Mr. Koe and Mr. J. F. Hall, for different parties. [*608]

THE MASTER OF THE ROLLS was of opinion that the eight survivors, children and grand-children, participated in the one-ninth share of William.

Reg. Lib. 1839, 966.



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A., being entitled to an undivided moiety of a piece of ground, agreed with B. that in case either of them should at any time purchase the other moiety, the whole should be divided in a particular manner between them; the moiety was sold to a third party, whereupon A. and B. further agreed that neither of them would purchase that moiety until they had agreed upon a sum to be given for it, subject to the stipulations and conditions of the former agreement. A. afterwards refused to agree upon the price to be given, and B. having purchased the moiety of the property, A. refused to carry the agreement into effect: Held, that A. was not justified in refusing to fix a price; and a suit having been instituted against him by B. for a partition of the property, Held also, that A. had abandoned the contract, and could not set it up as a bar to the partition. *Morris v. Timmins*, 411

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2. A decree was made against A. B., setting aside, as fraudulent, a purchase by an agent from his principal; and a re-conveyance, and the usual accounts of rents and purchase money were directed, in which an allowance was to be made for substantial repairs and lasting improvements. A. B. sold and conveyed part of the property, *pendente lite*, and died before the accounts were completed; a supplemental bill was filed against the purchasers and the heir and personal representatives of A. B.; the bill charged that the purchasers, in case of eviction, claimed compensation out of the estate of A. B.; the conveyances, *pendente lite*, being set aside, Held, that the purchasers were entitled in this suit, as against their co-defendants, the personal representatives of A. B., to an order for the repayment of their purchase money, and were entitled, as against the plaintiff, to an allowance for substantial repairs and lasting improvements, but that no greater relief could be given them in this suit.

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A testator directed his trustees to invest his personal estate, as soon after his death as a convenient purchase could be found, in a real estate, and settle it according to certain limitations. These limitations having become exhausted before the personal estate had been invested; Held, that the heir at law of the testator was not a necessary party to a suit to have the rights to the fund declared. *Hereford v. Ravenhill*, 481

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1. A plaintiff who enters into evidence to prove facts clearly admitted by the answer, must pay the costs, though he succeed in the suit. *Booth v. Booth*, 130
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A feme being entitled to a reversionary interest in property for her separate use, both she and her intended husband separately covenanted to settle any property, which she or her husband in her right, might become entitled to, upon certain trusts; the above interest having fallen into possession, Held, that it was subject to the trusts of the settlement. *Tawney v. Ward*, 563

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DEVISE.

1. A devise of real and personal estate to a feme covert, for life, for her independent use and benefit, with remainder to her husband, for life, "with remainder to the heirs of her body in tail," with remainders over; accompanied with a declaration, "that all the aforesaid limitations were intended by the testator to be in strict settlement." Held, that, subject to the husband's life estate, the wife took an estate tail in the real estate, and an absolute interest in the personalty. *Douglass v. Congreve*, 59
2. Devise to testator's widow, for life, with remainder to trustees and their executors, to pay costs, &c., and, to divide the residue of the rents amongst all the testator's brothers and sisters "who should be living at the time of the decease of his (testator's)

wife, and to their issue, male and female, after the respective deceases of his said brothers and sisters, for ever; to be equally divided between and among them." Held, that the words "issue male and female" were to be construed as words of limitation, and not of purchase; and that the children of a sister of the testator who died in the lifetime of the widow, took no interest under the devise.

A similar decision made with respect to personal estate. *Tate v. Clarke*, 100

3. A testator gave a rent charge to trustees, during the life of A. B. and her five daughters, in trust, to pay it to A. B. for life, and after her death, upon "trust for her said daughters, and the survivors and survivor, and while more than one should be living to be divided between them in equal shares." A. B. had five sons, and one daughter only: Held, that, subject to the life interest of A. B., her only daughter was entitled to the rent charge of 200*l.* for life. *Lord Selsey v. Lord Lake*, 146

4. A testator devised a freehold estate to A. for life, and after his death he devised the same to be equally divided into four parts, between one child of A., one child of B., one child of C. and one child of D., for them to receive the rents and divide the money between them; and it was his desire that his estate should never be sold out of the family; and provided A., B., C., and D. should never have any lawful children, the testator's desire was that their parts should go to their next of kin. At the time of making the will and of the death of the testator, B. only had a child, namely, a daughter, but after the testator's death, B. had a son. At the death of A. there were children, both sons and daughters, of A., C. and D. Held, first, that the gift to "one child" was not void for uncertainty; secondly, that the daughter of B., and the eldest child of A., C. and D. respectively, whether a son or daughter, who came into *esse* after the testator's death, were entitled; and thirdly, that under the words, the fee passed. *Powell v. Davies*, 532

5. Devise by testator "of all the lands and hereditaments vested in him as trustee or mortgagee in fee," held to pass trust estates vested in the testator, but not in fee. *Greenwood v. Wakeford*, 576

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other court for the same matter, may eight days after answer put the plaintiff to his election in which court he will proceed, unless the answer be excepted to within that time, in which case the defendant may require the plaintiff to obtain the Master's report in four days. The plaintiff may, however, move to discharge the order for election on the merits confessed in the answer. See 1st general order (9th May 1839). ix

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A testator directed his widow "to be in possession of all his furniture, plate, glass and books, and for the time of her natural life, to receive the yearly interest and profits of all his property that he was in possession of at his death:" Held, that the widow took a life interest only in the furniture, &c. *Lov v. Carter*, 426

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1. In a suit by the assignee under the insolvent debtors act, to recover some property for the benefit of the estate, a creditor of the insolvent is not a competent witness on behalf of the plaintiff: and he is not rendered competent by the 3 and 4 W. 4, c. 42, ss. 26, 27. *Holden v. Hearn*, 445
2. The obligee of a bond bequeathed it to A. B.: Held, in a suit by the legatee against the executor, that the obligor was an incompetent witness to prove that the bond was, under the circumstances, irrecoverable against him, and that he was not rendered competent by the 3 and 4 W. 4, c. 42, ss. 26, 27. *Davies v. Morgan*, 405

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1. Executors held, under the circumstances, justified in appointing an agent to get in the testator's debts, and in allowing him a salary for his trouble. *Hopkinson v. Roe*, 183
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 6. Executors, whose testator died in 1827, advertised for persons having claims or demands on the estate of their testator, and having provided for all that appeared, they, in 1829, distributed the estate amongst the legatees and took from them an indemnity. A demand previously unknown both to the claimant and the executors was made against the estate in 1836, and a bill filed to enforce it: Held, that if the claim were valid, the executors were still personally liable to the plaintiff. *Hill v. Gomme*, 540
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The testator mortgaged two estates by demise: he specifically devised one of them, (the Blunsden,) while the other (the Marston) descended on his heir; and he devised all his estates, (except the Blunsden and Marston,) and bequeathed his personal estate to his heir, subject to the payment of his debts. The heir afterwards covenanted to exonerate the Blunsden estate from the mortgage, and he subsequently joined in a deed, whereby, with the concurrence of the mortgagee, who was satisfied that the Marston estate was a sufficient security, the term, as to the Marston estate alone, was transferred to trustees to secure the mortgage money. The heir by his will devised the Marston estate specifically, upon certain trusts, and he gave all his other real and personal estate to his eldest son.

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"subject to the payment of his debts and the fulfilment of all his contracts and obligations:" Held, that the devisees of the Marston estate took it subject to the mortgage, and were not entitled to have it exonerated out of the personal estate of the second testator. *The Earl of Ilchester v. The Earl of Carnarvon*, 209

F

FEME COVERT.

1. On an application for payment out of court of money belonging to a *feme covert*, it must either be shown that there has been no settlement or agreement for a settlement: or if any settlement exist, it must be produced, to enable the court to judge whether it affects the fund in question: it is not sufficient to show by affidavit that the particular fund is not the subject of any settlement. *Rose v. Rolls*, 270
2. A wife established her right to a settlement, as against her husband's assignees, to the extent of one half of the fund: Held, that she could not afterwards waive the making of the settlement so as to defeat the rights of her children. *Whittem v. Sawyer*, 593

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A case was alleged on the pleadings to charge executors for what they might, but for their wilful default, &c., have received; at the hearing the common accounts only were directed against them; the case coming on for further directions, on the Master's report, Held, that the executors could not be charged as for their wilful default, &c., and that no inquiry could then be directed on the subject, although the Master's report laid a foundation for such an inquiry. *Garland v. Littlewood*, 527

G

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GRAMMAR SCHOOL.

The school was designated by the founder as a grammar school, but the boys were to be taught writing and arithmetic in all its branches; Held, that those who were qualified in other respects, ought to be admitted if they could read English and were capable of being taught the first elements of grammar. *In re the Rugby School*, 457
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H

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HUSBAND AND WIFE.

A husband transferred money in the funds into the joint names of himself and wife, for the purpose of making a provision for her; and by his will he bequeathed to his wife a life interest in "all his property that he was in possession of;" Held, that the stock did not pass. *Low v. Carter*, 426

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I

IMPERTINENCE.

Where, by the bill, a defendant is called upon to set forth, in the ordinary form, and without any limitation being suggested by the plaintiff, a schedule of deeds in his possession, it is not impertinent to state the names of the parties to the deeds, in addition to the dates and description of the estate to which they relate.

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1. Pending a suit for the establishment of a will of real estate, the heir at law, who had concurred in the will and in the establishment of the suit, having commenced actions of ejectment and detinue, to recover the estate and the title deeds, the court, on the application of the trustee, referred it to the Master, to inquire what proceedings ought to be taken to defend the actions, and restrained the actions in the meantime. *Edgcombe v. Carpenter,* 171

Under special circumstances, an injunction was granted on the application of a defendant against a co-defendant. *id*

2. An order *nisi* to dissolve the common injunction, obtained after exceptions to the answer have been filed, is irregular. *Howes v. Howes,* 197

3. The affidavit in support of a motion to extend the common injunction stated, on belief, that the answer would contain a discovery which, with other evidence, would enable the defendant at law to make a good defence to the action, "or tend materially to reduce the amount of damages sought to be recovered thereby;" Held, that this was sufficient. *Barker v. Barr,* 374

4. The plaintiff having obtained the common injunction either before or after answer, and whether or not continued, may obtain, as of course, an order to amend without prejudice to the injunction, he undertaking to amend within one week. *2d General Order* (9th May 1839). *xi*

5. Where common injunction has been obtained or has been dissolved on merits and the plaintiff afterwards amends, the plaintiff to be en-

titled to move for an injunction on affidavit of the truth of the amendments, unless the defendant plead, answer or demur to amended bill within eight days after appearance. *3d General Order,* (9th May, 1839.)

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A testator directed his trustees, as soon as convenient after the decease of his wife, to raise 10,000*l.* for his nephew, an infant, and to invest it and apply the income towards his maintenance. The testator had previously given his wife an annuity of 1000*l.* a year, payable quarterly. The wife pre-deceased the testator; Held, that the infant was entitled to interest on his legacy from the testator's decease. *Pickwick v. Gibbes,* 271

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L

LANDLORD AND TENANT.

A yearly tenant, having the option of purchasing the property, filed his bill against the landlord, for a specific performance of the contract for sale; the landlord having proceeded to eject the plaintiff, the latter applied for an injunction to restrain him; but the court declined granting it, except on the terms of the plaintiff undertaking to continue to pay the rent, without prejudice. *Pyke v. Northwood,* 152

LEGATEE.

See NOTICE.

LESSOR AND LESSEE.

Equitable assignee of leaseholds held liable at suit of the lessee, after the expiration of the term, to the breaches of covenant committed during his possession, although such lessee was no party to the contract for purchase, and it was stipulated, that the purchaser

should not be entitled to an assignment.

Close v. Wilberforce, 112

See VENDOR AND PURCHASER, 3, 4.

LIABILITY OF TESTATOR'S ASSETS IN CARRYING ON TRADE.

See WILL, 2.

LIMITATION.

See DEVISE, *passim*. SETTLEMENT.

M

MANUSCRIPTS.

See WILL, 3.

MERGER.

A person having a partial interest in an estate bought up charges thereon, and had them transferred to trustees for him; he afterwards became absolutely entitled to the estate; Held, under the circumstances, that the charges had merged in the inheritance. *Lord Selous v. Lord Luke*, 146

MISDESCRIPTION OF RESIDENCE.

See PRACTICE, 9.

MISJOINDER OF PLAINTIFFS

1. A husband and wife were joined as co-plaintiffs in a suit relating to the separate property of the wife, and the defendant objected, by his answer, to the misjoinder of the plaintiffs. The cause coming on to be heard, the court after hearing the case refused to dismiss the bill; but, upon the husband giving security for all the costs, permitted the bill to be amended, by adding a next friend, and making the husband a defendant. *England v. Dovens*, 96
2. The bill sought a general account of the estate of a testator who died in 1807, one of the co-plaintiffs being held bound by a settlement of accounts in 1822; Held, that in this suit all the other co-plaintiffs were equally bound by that settlement, and that in this suit the accounts could only be directed on the footing of such settlement. *Lambert v. Hutchinson*, 277

Notwithstanding a misjoinder of plaintiffs, the court permits a decree to be made at the hearing, when it appears that justice can be done to all parties notwithstanding the misjoinder. *id*

3. M. J., the personal representative of a deceased trustee, together with infants, beneficially interested in a fund, by M. J. their next friend, were co-plaintiffs in a suit, the object of which was to make the tenant for life and his interest in the trust funds answerable for part of the trust funds which the tenant for life had applied to his own use; there were other parties interested in the restitution of the fund, who were made defendants. The court, being of opinion that the trustee's assets might, in the progress of the suit, have to be resorted to for the purpose of making good the

breach of trust and that the interests of the infants and of M. J. would thereby ultimately become conflicting, dismissed the bill with costs, on the ground of the misjoinder of plaintiffs, but without prejudice to any new bill. *Jacob v. Lucas*, 436

MORTGAGE.

1. Where a mortgage is made to several persons jointly, they are, in equity, tenants in common of the mortgage money, and the representatives of such of them as may be dead are necessary parties with the survivor to a bill for foreclosure or redemption. *Vickers v. Cowell*, 529
 2. Foreclosure suits may be advanced for hearing like other causes. *4th General Order* (9th May 1839). xii
- See EXONERATION. NOTICE. OUTSTANDING TERM. POWER OF SALE. PROVISIONAL ASSIGNEE.

MORTGAGOR AND MORTGAGEE.

See PRODUCTION OF DEEDS AND PAPERS, 4. RECEIVER, 2. STATUTE, 3.

MOTION.

The proper mode of obtaining money out of court is by petition: but the rights of the parties having been ascertained by arbitration and no decree having been made, the court in this case ordered payment of money out of court upon motion. *Oliver v. Burt*, 583

See COSTS, 2. PRACTICE, 1, 3, 5. PRODUCTION OF DEEDS AND PAPERS, 2.

MOTION TO DISMISS.

A plaintiff having obtained an order of course to amend after the time limited for that purpose had expired, and the defendant being in a condition to move to dismiss for want of prosecution; Held, that a single notice of motion to discharge the irregular order and to dismiss the bill was not irregular on the ground of multifariousness. *Traile v. Ball*, 475

MULTIFARIOUSNESS.

See MOTION TO DISMISS.

N

NEXT FRIEND.

1. The Master reported that a suit instituted on behalf of infants was improperly instituted and ought not to be prosecuted. It was dismissed, with costs to be paid by the next friend. *Fox v. Suwerkrup*, 583
2. In a clear case, the court, being of opinion that a suit had been commenced by the next friend of infants to promote his own views, and not for the benefit of the infants, summarily, and without a reference to the Master, dismissed it with costs, to be paid by the next friend. *Sale v. Sale*, 586

NEXT OF KIN.

See CONVERSION.

NOTICE.

The testator having charged his real estate with his debts and legacies, devised it to his eldest son A. B. in fee, and appointed him executor. A. B. mortgaged the estate, and covenanted against all incumbrances, except the legacies; Held, first, that the mortgagee took for his security the estate, *minus* the amount of legacies; and secondly, that the unpaid debtors of the testator were entitled to the fund reserved in the mortgage deed for legacies, in priority of the legatees. *Eland v. Eland*, 235

A. B., the executor and also devisee of real estate subject to debts and legacies, mortgaged it, first, to C. D. subject to the legacies, and afterwards to E. F. subject to the mortgage to C. D.; Held, that E. F., taking with notice of C. D.'s mortgage, took subject to the legacies. *id*

O

ORDER OF COURSE.

See PRACTICE, 12.

OUTLAWRY.

Though an outlaw cannot come into court to establish a demand, yet he may apply to the court to set aside an attachment which has been irregularly issued against him *Hawkins v. Hall*, 73

OUTSTANDING TERM.

A mortgagee in whom a satisfied mortgage term was vested, held, under the circumstances, bound to assign it to the trustee of the will of a testator, without the concurrence of the parties beneficially interested in the property under it. *Poole v. Pass*, 600

A testator allowed a satisfied mortgage term to remain outstanding in the mortgagee, and he devised the estate to a trustee in such a manner as, in the opinion of the court, to entitle him to call for an assignment of the term without the concurrence of the parties beneficially entitled; the termor, under the advice of counsel, refused to assign without the concurrence of the parties beneficially interested, and a suit became necessary to compel him; The court, though of opinion that the termor was not entitled to insist on his objection, gave him his costs, charges and expenses. *id*

See DEMURRER.

P

PARENT AND CHILD.

1 An increased allowance for maintenance made out of the property of infants, for the

purpose of supporting their parents who were in great indigence. *Allen v. Coster*, 202

2. In consideration of 100*l.* paid by the plaintiff's father to A. B., the latter covenanted to maintain and apprentice the plaintiff, and that he should take a specified interest in all the real and personal estate which A. B. should possess at his death; the condition in life of the plaintiff not having been altered, and no expectation on his part having been defeated: Held, that this contract might be put an end to by agreement between the plaintiff's father and A. B.

Seemle, that if there had been part performance of the agreement altering the condition in life of the plaintiff, then the court would not have permitted the father to take him back to his prejudice, and would have compelled a complete performance in his favor. *Hill v. Gomme*, 540

See FEME COVERT, 2.

PARTIES.

See CO-DEFENDANTS. MORTGAGE, 1. PLEA. PLEADING, 3. SUPPLEMENTAL BILL.

PARTITION.

1. In a partition suit, costs, as at law, are not given on either side at the hearing; but where a defendant set up an agreement in bar of the right of the plaintiff to a partition, he was directed to pay so much of the costs as were occasioned by that part of the defence. *Morris v. Timmins*, 411

2. A road was set out by two tenants in common of property, for the convenience of their respective dwelling houses for ever; the court, in a partition suit, though of opinion that it ought not to be interfered with, declined giving any special direction on the subject to the commissioners. *id*

See AGREEMENT.

PARTNER.

See SHIP.

PATENT.

1. A bill filed by a patentee, to restrain the piracy of his patent and for an account, did not distinctly state the specification or explain the nature of the invention for which the patent right was claimed; but it alleged that the specification was duly enrolled, and that the drawings and description in the specification could not be set out in the bill, and it charged that the plaintiff was the inventor and that the invention was new; the court (not without some doubt held, on the authority of *Kay v. Marshall*, that the bill was not demurrable. *Westhead v. Keene*, 287

2. Where a bill is filed by a patentee for an injunction to restrain an alleged infringement of his patent, the plaintiff is not precluded from asking for an injunction at the hearing, by the fact of his not having applied for it on an interlocutory motion; but the not moving for the injunction imposes on the plaintiff, in such a case, the obligation of making out a

clear and unexceptionable title at the hearing; and if he fails in that, and has not previously obtained an injunction, he will not be allowed to use the facts proved in the cause, as evidence of a *prima facie* case, giving him a right to further time, for the purpose of enabling him to establish more satisfactorily his legal title. *Bacon v. Spottiswoode*, 382

A patentee brought the cause to a hearing without having previously moved for an injunction, and the court being of opinion, that on the evidence then produced an injunction would not have been granted on an interlocutory application, refused to retain the bill to give the patentee an opportunity of establishing his right at law, but dismissed it with costs. *Bacon v. Spottiswoode*, *Bacon v. Jones*, 382

3. Before the grant of the plaintiff's patent, the reach in spinning machines varied from less than an inch to thirty-six inches, according to the length of the fibre of the material. The plaintiff discovered a new and improved mode of preparing flax and other fibrous substances, in which process the fibre became shortened, and the length of the reach in spinning it was necessarily diminished. The plaintiff obtained a patent, first for thus preparing the flax and other fibrous substances; and secondly, for spinning it at a shorter reach than had been done before, namely, at two inches and a half: Held, that the second part of the patent could not be supported, and that the patent was, therefore, invalid. *Kay v. Marshall*, 535

PAYMENT OUT OF COURT.

See FEME COVERT, 1. MOTION.

PETITION.

See MOTION. PRACTICE, 2.

PLEA.

- C. E., in the lifetime of her husband, contracted a second marriage with the testator, and after his death, with J. C. The testator believing C. E. to be his wife, bequeathed to her all his property, and appointed her his executrix; she proved his will, and J. C., as her husband, possessed part of the estate of the testator; the next of kin having filed a bill against C. E. and her real husband, impugning the validity of the will, and seeking an account of the testator's estate: Held, that the husband of C. E., though he had not interfered, was a necessary party, but that J. C., her supposed husband, was not. *McKenna v. Everitt*, 134

PLEADING.

1. It is not enough to state, that persons who, in respect of interest, are necessary parties, are out of the jurisdiction: the bill must go on to pray process against them. *Munoz v. De Tastet*, 109 n.
2. In order to enable an infant defendant to enter into evidence in support of facts which would not otherwise be in issue in the cause,

it is proper that they should be stated in his answer; but whatever admissions may be made or points tendered in issue in the answer of an infant, the plaintiff is not in any degree exonerated from proving as against the infant the whole case on which he relies. *Holden v. Hearn*, 445

3. The bill stated that the plaintiff, with the parol consent of the defendant, a surety, had by deed released the principal debtor, and that having brought an action at law against the surety, it had been held, that the surety was released. The bill prayed payment by the surety of the debt: Held, on demurrer, that the principal debtor was a necessary party to the suit. *Brooks v. Stuart*, 512
- See Co-DEFENDANTS, 1. 2. DEMURRER. MISJOINDER OF PLAINTIFFS. MORTGAGE. 1. PLEA. PRACTICE, 11. POWER, EXECUTION OF. STATUTE OF FRAUDS. SUPPLEMENTAL BILL. TRUSTEE, 8.

POOR.

See CHARITY, 1.

POWER, EXECUTION OF.

- A. B., being desirous of voluntarily settling property on the female descendants then in existence of C. D., by deed reciting this desire and that certain persons therein named were the only descendants then in life of C. D., settled a part of the property on the persons so named, and reserved to himself a power of appointing the remaining part of the property amongst such several persons before named, which, in default of appointment, was given to those several persons named; he afterwards discovered that there were other descendants in existence of C. D., who had been omitted, and, to remedy the omission, he appointed a part of the fund to an object of the power, upon his executing bonds for the payment to the persons newly discovered, of the amount when received: Held, that the appointment was void, and that the court would not, in a suit to have the rights of the parties to the appointed fund declared, determine whether the case was such as to entitle the parties to have the settlement reformed according to the intention of the settlor. *Lee v. Fernie*, 483

POWER OF SALE.

- A trust, "to make sale and dispose of" the testator's real estates, by private sale or public auction, Held, not to authorize a mortgage; there appearing an intention on the part of the testa or, that his whole real estate should be converted. *Haldenby v. Spafforth*, 390

PRACTICE.

1. A motion for an injunction and receiver is irregular where the plaintiff amends his bill between the time of giving notice of moving and the time of bringing on the motion. *Gouthwaite v. Rippon*, 54

2. It is irregular to confirm the Master's report, approving of a contract for sale of an estate being carried into effect, by a petition of course with the consent of the clerks in court of all parties. Such a report ought to be confirmed by a special petition, stating all the facts. *Briley v. Todd*, 95
3. Notice of motion was given for the payment of money into court, but the notice did not proceed to state that an application would be made for its investment; one of the parties did not appear on the motion: Held, that no order for investment of the fund could be made. *Robinson v. Wood*, 206
4. Where facts, not founded on the allegations in the bill, are introduced into affidavits in support of an application for a receiver, the court will disregard them, and a defendant acts properly in not answering them. *Dawson v. Yates*, 301
5. In a creditor's suit instituted by the plaintiff on behalf of himself and all other creditors, the defendant is entitled on motion, at any time before decree, to have the bill dismissed, on payment of the demand of the plaintiff and his costs as between party and party; but if there be other defendants, their costs must also be paid. *Pemberton v. Topham*, 316
6. The plaintiff, arrested under an attachment sued out by the defendant, which was afterwards set aside for irregularity, brought an action for false imprisonment against defendant. The court restrained the action and referred it to the Master to settle a proper compensation. *Bicknell v. Stamford*, 368
Where a party is arrested by virtue of the process of this court, which turns out to be irregular, he may apply to the court, either for a reference to the Master to settle a proper compensation, or for liberty to bring an action. *id*
7. Where the plaintiff failed in proving, at the hearing, a fact which was the very foundation of his title; Held, that it was not the proper subject for an inquiry before the Master; and the bill was dismissed with costs, with liberty to file a new bill. *Holden v. Hearn*, 445
8. Where a party who does not appear at the hearing is alleged but is not proved to be out of the jurisdiction, it is not the practice to direct an inquiry before the Master as to that fact; but the proper course is to obtain leave to exhibit an interrogatory to prove it. *Dibbs v. Goren*, 457
9. Where a plaintiff wilfully misrepresents his place of residence on the record he will be ordered to give security for costs, but this rule does not extend to cases where it is done innocently and from mere error. *Simpson v. Burton*, 556
10. A check of the Accountant General was alleged to have been accidentally destroyed; the court, though not satisfied with the evidence of its destruction, directed the issue of a new check, on the ground that the other check, being more than a year old, would not be paid if presented. *Taylor v. Scrivena*, 571
11. It is the duty of a plaintiff to come fully

prepared at the hearing to ask the court for a decree: and if he is not so prepared, and the suit appears defective from his default, it is then a matter of discretion or indulgence to grant him leave to supply the defect. *Bierdermann v. Seymour*, 597

A cause came on, and was ordered to stand over for want of parties; it was brought on a second time, when the allegations and statements in the bill were found so defective, as to prevent the court making a decree, and the suit was again defective for want of parties; the court gave the plaintiff leave to set the record right, but only on the terms of his paying the defendants the costs of the former and of the present hearing. *Bierdermann v. Seymour*, 594

12. Where order of course is alleged to have been irregularly obtained at the Rolls in cases marked "Lord Chancellor," any application to discharge it shall be first made to the Master of the Rolls. *6th General Order* (1839). xii
- See ANNUITY, 1, 2. ASSETS IN INDIA. ATTACHMENT. CO-DEFENDANTS, 1, 2. COSTS, 1, 2. CROSS BILL. ELECTION. EXCEPTIONS, 1. FEME COVERT, 1. FIERI FACIAS, *passim*. FURTHER DIRECTIONS. GENERAL ORDERS, *passim*. GUARDIAN AND WARD. INJUNCTION, *passim*. JURISDICTION. LANDLORD AND TENANT. MISJOINDER OF PLAINTIFFS, 1. MOTION. MOTION TO DISMISS. PRELIMINARY ACCOUNTS AND INQUIRIES. PREROGATIVE. PRODUCTION OF DEEDS AND PAPERS, *passim*. RECEIVER, 1. SCANDAL AND IMPERTINENCE. SEQUESTRATION, 1, 2. SHORT CAUSE. SOLICITOR AND CLIENT, *passim*. STATUTES, *passim*. STOP ORDER. SUBPOENA. TAXATION OF COSTS, 1. TRUSTEE, 4, 6, 8. VENDOR AND PURCHASER, 1.

PRELIMINARY ACCOUNTS AND INQUIRIES.

Plaintiffs to be at liberty, at any time after appearance, to move that preliminary accounts and inquiries be taken, and order shall thereupon be made without prejudice to any question in the cause, if it appears beneficial to those incompetent to consent, and is consented to by the defendants who have not answered, and is consented to by or is proper upon the answer of those who have answered. *5th General Order* (9th May, 1839.) xii

PREROGATIVE.

- A. B. being entitled to a fund in court, died, and administration was granted to a person, as "the natural and lawful sister" of A. B. It appearing from the proceedings in the cause that A. B. was illegitimate, the court refused to pay the fund to the administratrix, but directed it to be carried over to a separate account, with directions that it should not be paid out of court without notice to the Crown. *Long v. Wakeling*, 400

See ALIEN.

PRESUMPTION.

See WASTE LANDS.

PRINCIPAL AND SURETY.

See PLEADING, 3.

PRIVILEGE.

See PRODUCTION OF DEEDS AND PAPERS, 1.

PRODUCTION OF DEEDS AND PAPERS.

1. The privilege of a client, as to discovery, is not co-extensive with that of his solicitor; there are cases where the solicitor would be protected from discovery, but the client would not. *Greenlaw v. King*, 137

A case submitted to counsel, and confidential communications had with his solicitor by a deceased owner of a charge on a living, in contemplation of proceedings being taken by the future incumbent, and which had come into the possession of the defendant, who was the assignee of the charge, Held, not privileged. *id*

Confidential communications which took place after the dispute had arisen, between a defendant and a solicitor who acted as agent and adviser only, but not as solicitor; Held, not privileged. *id*

2. The court will not, at the instance of a defendant, order the plaintiff to produce documents, admitted to be in his possession and to relate to the matters in question, for the inspection of the defendant.

Where, however, the plaintiff called upon the defendant to inspect a document in his, the plaintiff's possession, and to explain several errors in his accounts therein alluded to, and submitted to produce the same, the court ordered that the defendant should have one month's time to answer, from the time of the plaintiff's depositing the account with his clerk in court for the defendant's inspection. *Shepherd v. Morris*, 175

Whether a plaintiff can deposit a document with his clerk in court, and compel the defendant to inspect it before answering? *Quare. id*

3. Where on a motion for the production of papers admitted to be in the defendant's possession, the right to their production depends on documents stated in the bill, but which are neither admitted nor denied by the answer, the plaintiff is at liberty to verify such documents by affidavit. *Addis v. Campbell*, 258
4. A mortgagee, who was a party to the suit, consented to a sale of the mortgaged property; Held, that he must produce and leave in the Master's office the title deeds which were necessary in order to complete such sale. *Livsey v. Harding*, 343

See SOLICITOR AND CLIENT, 6.

PRODUCTION OF LESSOR'S TITLE.

See VENDOR AND PURCHASER, 3.

PROVISIONAL ASSIGNEE.

The provisional assignee of an insolvent debtor having been made a defendant to a suit by a mortgagee to foreclose the insolvent and those claiming under him, Held to be entitled to his costs, to be paid by the plaintiff, who was to

add them to his security. *Parker v. Burney*, 492

PURCHASE MONEY, LIABILITY TO SEE TO APPLICATION OF.

See NOTICE.

R**REAL AND PERSONAL ESTATE.**

See CONVERSION.

RECEIVER.

1. A receiver being appointed to get in the outstanding estate of a testator, the court gave leave to a party who was willing to pay a sum due to the estate into court to do so, in order to save the poundage which would have been incurred if it had passed through the hands of the receiver. *Haigh v. Grattan*, 201
2. At the instance of a mortgagee of a West India estate, a receiver and manager had been appointed; Held, that he was not entitled to the produce of crops severed and shipped to the consignee of the mortgagor prior to the appointment, although there had been no conversion prior to that time. *Codrington v. Johnstone*, 520

See ASSETS IN INDIA. FORFEITURE.

REFERENCE TO MASTER.

See ASSETS IN INDIA. INFANT. PRACTICE, 7, 8.

RELEASE.

A release, though unlimited in its terms, held, from the recitals and context, to operate only as to a particular sum mentioned in the recitals. *Linda v. Linda*, 496

An intestate at his death was indebted to D. M. in 1687*l.*; disputes, however, arose between the administrator and next of kin as to the legality of the debt, and an agreement was come to between them and the brother of the intestate, whereby, reciting that all the property had been got in, and, excluding the disputed debt, amounted to 533*l.*; that doubts having arisen as to the validity of that debt, and that being desirous of maintaining the good fame and character of the deceased, the three parties had agreed to waive all questions as to the validity of the debt, and raise a fund to make good the deficiency; that the next of kin had agreed to "relinquish all claim to any residue or surplus;" that the intestate's brother should furnish 384*l.* towards payment of the debt, and the administrator should make good all the residue. It was witnessed that the next of kin released to the administrator all his right, &c., to the personal estate of the intestate, as his next of kin or otherwise, the brother covenanted to pay his part, and the administrator covenanted to pay the residue out of his own money, and also to pay all other debts, &c., of the intestate. The debt was paid, and other funds afterwards fell in to the intestate's estate; Held, that the ad-

ministrator was not, under the release, entitled thereto. *id*

RENT CHARGE.
See SEQUESTRATION, 1, 2.

REPORT, CONFIRMATION OF.
See PRACTICE, 2.

REVERSION.
See PRODUCTION OF DEEDS AND PAPERS, 3.

ROAD.
See PARTITION, 2.

S.

SCANDAL AND IMPERTINENCE.

Exceptions for scandal and impertinence, taken on summary proceedings upon petition, should, where there is no clerk in court, be served on the solicitor. *In re Gornall*, 226

SEPARATE USE.

1. A testator gave property to trustees, in trust for his wife for life, with remainder to M. A. T., then a feme sole, for life, in such manner that it should not be anticipated, and that no husband should acquire any control over it. M. A. T. was unmarried at the death of the testator, but she married in the lifetime of the widow; Held, that both the separate use clause, and the restriction against alienation, became effectual on her marriage. *Tullett v. Armstrong*, 1

Property given to a woman for her separate use, independent of any husband, may be enjoyed by her as her separate estate, although the property becomes vested in her while discover. If the gift be made for her separate use, without more, she has, during coverture, an alienable estate independent of her husband; but if the gift be for her separate use, without power of alienation, she has, during coverture, an unalienable estate independent of her husband; in either case, however, she has, while discover, a power of alienation. *Tullett v. Armstrong*, 1

The restraint against alienation is annexed to the separate estate only, and the separate estate has its existence only during coverture; but whilst the woman is discover, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage. *id*

2. A testator bequeathed a sum in trust, for his daughter, then and at his death a widow, for her separate use. After the death of the testator she married: Held, that her husband acquired no interest in the fund. *Scarborough v. Borman*, 34
3. An annuity was bequeathed to a lady, who was unmarried at the death of the testator, for her separate use, independent of any husband with whom she might at any time marry, and without power of anticipation. After

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the death of the testator, the legatee married, became a widow, and contracted a second marriage. No disposition having been made by her while discover; Held, that the separate use and anticipation clauses attached to the annuity during the second marriage. *Clark v. Jaques*, 36

4. A lady being entitled, subject to a prior life estate, to certain freehold and funded property, she settled the same, on her first marriage, for her separate use, independent of her intended, or any other husband. Her first husband died, and she married a second time; Held, that the property still belonged to her as her separate estate. *Dixon v. Dixon*, 40

SEQUESTRATION.

1. A defendant, against whom a sequestration had issued, was entitled to a rent-charge issuing out of the estate of A. B., with power of distress; the rent-charge being in arrear, was claimed both by the sequestrators and the defendant; A. B. offered to pay the arrears to the sequestrators on being indemnified; but no protection having been afforded her, she paid over the arrears to the defendant who threatened to distrain; Held, that A. B. was entitled to protection, and that an application ought to have been made to the court for an order for her to pay; and that, under the circumstances, she was not liable to repay the amount to the sequestrators. *Wilson v. Metcalfe*, 263

Choses in action are subject to the process of sequestration. In a clear and simple case, a sequestration may be made effective in respect of choses in action by an order only, or a voluntary payment may be protected; in other cases, it may be necessary to resort to an action or suit under the direction of the court. *id*

2. Order made for payment to sequestrators, by a party out of whose estate the same was issuing, of a rent-charge payable to the person whose estate was sequestered. *Wilson v. Metcalfe*, 270

SETTLED ACCOUNT.

See MISJOINDER OF PLAINTIFFS, 2.

SETTLEMENT.

By a marriage settlement certain specified property of the wife was settled, with an ultimate limitation, in default of children, to her next of kin, and the husband covenanted to settle any property which his wife, or he in her right, should thereafter, during the coverture, succeed to the possession of or acquire, on like trusts. At the time of the marriage, a sum of money, which was not mentioned in the settlement, stood settled, in trust, for the wife for life, with remainder to her children, with remainder as she should appoint, and in default thereof, "to her executors, administrators and assigns." The husband survived the wife, there were no children, and the wife made no appointment; Held that, after the death of the husband and wife, the next

of kin of the wife, and not the representatives of the husband, were entitled to the fund. *Graffey v. Humpage*, 46
See FEME COVERT, 2.

SHERIFF.
See FIERI FACIAS, 3.

SHIP.

Where the members of a trading partnership are interested in a ship, the names of all the partners should appear on the ship's register; and a ship belonging to a partnership having been registered as belonging to two partners carrying on trade under a particular firm, it was held, that a third partner who formed one of the firm, but whose name was not on the register, had no interest in the ship. *Slater v. Willis*, 354

SHORT CAUSE.

It is contrary to the practice to advance a foreclosure suit to be heard as a short cause, unless with the consent of the defendant. *Levin v. Moline*, 99

But see MORTGAGE.

SOLICITOR AND CLIENT.

1. Where a client, resident abroad, applies for the taxation of his solicitor's bill of costs, on his undertaking to pay, he must give security for the costs of the proceeding. *In re Pasmore*, 94

2. An order of course for taxation cannot be supported on merits as a special order, upon the occasion of a motion to discharge it. *Grove v. Sansom*, 297

Whether the taxation, at the instance of a *cestui que trust*, of a bill of costs which has been long since settled and paid by trustees out of a trust fund, ought to take place as against the solicitor, or as against the trustees for the purpose of justifying their payment, *quare*. *id*

3. Under the common order for the taxation of costs, the Master is not authorized to take an account of pecuniary matters between the parties, which are foreign to the bill of costs; but *secus* where moneys are paid by the client on account of the bill of costs, or where, by agreement between the solicitor and client, the moneys which come to the hands of the solicitor are to be applicable to the payment of the bill of costs. *Jones v. James*, 307

Under the common order, the Master is not authorized to allow interest on the balances of moneys of the client from time to time in the hands of the solicitor, though such appears to have been the agreement between the parties. *id*

4. A bill of costs having been incurred by A. and B. jointly, and an action having been brought against them for the recovery of the amount, the court refused to direct a taxation and to stay the proceedings at law, on the undertaking of A. alone to pay what might be found due. *In re Chilcote*, 421

5. In a suit for the administration of the estate of a testator, a solicitor carried in a claim for his bills of costs, which, on taxation, were reduced by more than one-sixth; Held, that the solicitor ought to pay the costs of the taxation. *Silvertop v. Ramsay*, 434

6. A client deposited with his solicitor the title deeds of an estate, to secure a sum of money then due, and certain costs then incurred; the court, on the petition of the client, ordered the deeds to be delivered up to the client, on his paying into court a sum sufficient to cover the solicitor's claim, and directed the usual taxation. *Mills v. Finlay*, 560

See FIERI FACIAS, 4. GENERAL ORDERS, 2. PRODUCTION OF DEEDS AND PAPERS, 1.

SPECIFIC LEGACY.

Held, that a gift to A. B. "of the sum of 100*l.*, which said sum is owing to me, by bond, from her father," was a specific and not a demonstrative legacy. *Davies v. Morgan*, 405

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 2, 3, 4.

STATUTE OF FRAUDS.

Where the want of signature to an agreement for the sale of lands clearly appears on the bill, the objection may be taken advantage of by general demurrer; but the statements of the bill not being inconsistent with a signature by the party to be charged, and containing allegations of part performance, a general demurrer thereto was overruled. *Field v. Hutchinson*, 599

STATUTE OF LIMITATIONS.

A trust for the payment of debts, in a will of personal estate, will not prevent the operation of the statute of limitations. *Evans v. Tweedy*, 55

STATUTES.

1. The executor of the survivor of three trustees declined to prove his will; Held, that the case was within the 1 W. 4, c. 60. *Ex parte Hagger in re Merry's Trust*, 98

2. A defendant having been committed to the Fleet for not answering, was discharged with costs, in consequence of having been turned over to the Fleet, after the expiration of the time limited to the plaintiff, by the 11 G. 4, and 1 W. 4, c. 36, s. 15, rule 5, for bringing him to the bar of the court. *Greening v. Greening*, 121

3. A mortgagee was resident out of the jurisdiction; Held, that the case was not within the 1 W. 4, c. 60, the 4 and 5 W. 4, c. 23, or the 1 and 2 Vict. c. 69. *Green v. Holden*, 207

4. A testatrix directed funds to be transferred in the bank books, into the names of A. B. and wife, and their children who were infants, for the benefit of A. B. and wife for life, with remainder to their children; this was done, and

a suit being instituted for the performance of the trusts; Held, that the court had no jurisdiction under the 1 W. 4, c. 60, to order the infants to transfer the fund into court. *Watts v. Scrivens*, 223

5. One of two executors appearing, from proceedings in the cause, to be a trustee within the meaning of the 1 W. 4, c. 60, of a fund standing in the testator's name, and it being proved by affidavit that he was living out of the jurisdiction, the court, without a reference to the Master, made an order under this act for the transfer of the fund by his co-executor. *Parker v. Burney*, 492
See APPRENTICE. CHARITY, 2. EVIDENCE, 1, 2. FRIENDLY SOCIETY. SHIP.

STOP ORDER.

The stop order can only be granted either on an admission or proof of the incumbrance; and will not be granted "without prejudice to the validity of the charge." *Winchelsea v. Garrety*, 223

STRICT SETTLEMENT

See DEVISE, 1.

SUBPENA, SERVICE OF.

Service, out of the jurisdiction, of a *subpœna* for payment of costs, is irregular. *Hawkins v. Hall*, 73

SUPPLEMENTAL BILL.

One of several co-plaintiffs mortgaged his interest and became insolvent pending the suit. A supplemental bill was filed by the other co-plaintiffs against the mortgagee and the provisional assignees alone: Held, that the defendants in the original suit, who were accounting parties, ought also to have been made parties to the supplemental suit. *Feary v. Stephenson*, 42

T

TAXATION OF COSTS.

A suit was instituted for the administration of an estate, and to charge an executor with interest on balances retained in his hands; the decree directed a taxation of the costs of so much of the suit as sought to charge interest: Held, that this comprised not only the excess of costs incurred by the question of interest, but also an apportionment of the general costs of the suit. *Heighington v. Grant*, 228

Mode of taxation of a bill of costs where an apportionment is directed. *id*
See SOLICITOR AND CLIENT, 1, 2, 3, 4, 5.

TENANT IN COMMON.

See DEMURRER.

TITLE, PROOF OF.

A good title may be made to an estate, although the origin cannot be shown by any deed or will; but it must be shown, that there has been such a long uninterrupted possession, enjoyment and dealing with the property, as afford a reasonable presumption that there is an absolute title in fee simple. *Cottrell v. Watkins*, 361

See WASTE LANDS.

TRANSFER.

See EXECUTOR, 2.

TRUST FOR PAYMENT OF DEBTS.

See STATUTE OF LIMITATIONS.

TRUSTEE.

1. A trustee who stands by and sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust. *Booth v. Booth*, 125

A testator bequeathed to his partner and to B., his personal estate, upon trust to invest the same for the benefit of his wife and children. Both the executors proved the will, and the surviving partner retained the testator's moneys in the trade, which were lost. B. took no active part in the trusts, but was cognizant of the breach of trust, and took no proceedings to prevent it; Held, that B. was responsible for the consequences of the breach of trust. *id*

The interest of a *cestui que trust*, who concurs with a trustee in a breach of trust, is liable to indemnify the trustee. *id*

2. A trustee acting *bona fide* and with the concurrence of the heir at law, under a will which was supposed to be valid as to real estate, but which afterwards turns out to be invalid, is entitled to be indemnified out of the personal estate. *Edgecumbe v. Carpenter*, 171

3. Pending an information filed for the purpose of having new trustees of a charity appointed in the place of some who were dead, the surviving trustees took upon themselves, without the sanction of the court, to appoint new trustees: Held, that though this was neither a contempt nor an act altogether void, yet it imposed upon the trustees the necessity of proving, by the strictest evidence, and at their own expense, that what had been done was perfectly right and proper; and the case not appearing altogether clear, the appointment was set aside, and the trustees were ordered personally to pay all the extra costs occasioned by their act. *Attorney General v. Clack*, 467

4. The bankruptcy of a trustee is a sufficient ground for his removal from that office, although he has obtained his certificate, and the trust property is in the hands of a receiver. *Bainbridge v. Blair*, 495

5. A testator died in March, 1823, and in Ja-

- bruary, 1824, and January, 1825, the executors and trustees deposited part of the assets in the hands of bankers, on their notes carrying interest; the bankers failed in November, 1825, and no necessity having been shown for such deposit, the trustees were held personally responsible for the loss. *Darke v. Martyn*, 525
6. The court declined making an order allowing a feme sole to propose herself to be trustee, on the ground that on her marriage her husband might interfere with the trust. *Brook v. Brook*, 531
7. A testator devised and bequeathed his freehold and leasehold estate to trustees for sale, and he "declared that his trustees respectively should be entitled to have and receive, out of the trust moneys, all costs, charges and expenses, fees to counsel and for advice, and for professional assistance, and loss of time, paid, incurred, sustained or occasioned in or about the execution of the said trusts or in anywise relating thereto." One of the trustees was a land surveyor, and he superintended the management and sale of the estates: Held, that he was entitled to a compensation for loss of time. *Willis v. Kibble*, 559
8. The trustee of a marriage settlement concurred in a breach of trust, by lending the fund to the husband on a security not warranted by the settlement: Held, that the representatives of such trustee could maintain a bill against the husband and the other *cestuis que trust*, for the restitution of the fund. *Greenwood v. Wakeford*, 576

Trustees are not entitled, as against the trust estate, capriciously to refuse to continue; but if they find the trust estate involved in complicated questions not in contemplation when they undertook the trust, they have a right to come to this court for relief. *id*

See APPROPRIATION. NOTICE. OUTSTANDING TERM. SOLICITOR AND CLIENT, 2. STATUTES, 1, 3, 4, 5.

U

UNCERTAINTY.

See DEVISE, 4. PATENT, 1.

V

VENDITIONI EXPONAS.

Where sheriff returns that he has seized, but not sold, a party may sue out "*venditioni exponas*." 4th General Order, (10th May, 1839.) xiii

VENDOR AND PURCHASER.

1. A resale of property, sold under a decree, ordered, in case the purchaser did not pay his money into court within a given time; and the purchaser ordered, in that case, to make

good the deficiency and to pay the costs of all the proceedings. *Gray v. Gray*, 199

2. The fact of a title having been perfected in the Master's office, does not determine the question of the costs of a suit for specific performance, which depends upon whether the defects which have been removed there, were the occasion of the suit. *Scoones v. Morrell*, 251

3. A party contracted for the purchase of the benefit of an agreement for the lease of a public house, and also of the stock and good will; he entered into possession before the lease had been granted, paid part of the purchase money and mortgaged his interest; Held, that after this mode of dealing he was not entitled to call for the production of the lessor's title, or for evidence that the lease was made in conformity with the power under which it was granted. *Haydon v. Bell*, 337

4. A. agreed to demise certain premises to B. There was an outstanding equitable interest vested in C.: Held, that B. was bound to accept a demise from A. in which C. joined; and was not justified in insisting on A. obtaining a release from C. in order to enable him alone to make a valid demise. *Reeves v. Gill*, 375

See NOTICE. PRODUCTION OF DEEDS AND PAPERS, 3.

VESTED INTEREST.

See WILL, 1, 4.

W

WASTE LANDS.

Where strips of land lie between the highway and the adjoining enclosure, the legal presumption is, that the soil belongs to the owner of the adjoining old enclosure. *Scoones v. Morrell*, 251

WATCHES AND PERSONAL ORNAMENTS.

See WILL, 3.

WILFUL DEFAULT.

See FURTHER DIRECTIONS.

WILL.

1. A testator gave real and personal estate to trustees, to accumulate the rents, &c., for twenty years after his decease; and after certain payments, to stand possessed of the accumulated fund, in trust for all and every the child and children of his children, A., B. and C. "now born or who shall hereafter be born, during the lifetime of their respective parents, as should attain twenty-one or marry with consent, and whether born or unborn when any other of them attain the age or time

aforesaid, and their respective executors, administrators and assigns."

At the expiration of the twenty years there were several children of B. who had attained twenty-one; but A. and B. were still living: Held, that the grandchildren had vested interests in the fund, subject to be divested or diminished in the event of there being other children of A. or B. who should attain twenty-one or marry.

Held also, that, in the meantime, the grandchildren who had attained vested interests were entitled to the income of the accumulated fund. *Scott v. The Earl of Scarborough*, 154

A testator being entitled to a sum of 15,000*l.* raiseable out of an estate, bequeathed the same to trustees, on trust, during twenty years, to invest the interest and accumulate the same by way of compound interest; and, subject to certain payments, he gave "the 15,000*l.* and the interest and accumulations of the same," for the benefit of the children of A. B., and, after the end of twenty years, he directed "the principal of the said sum of 15,000*l.*" to merge in the estate. In other parts of the will the testator had referred to the fund given to the children of A. B., as "the interest of the said sum of 15,000*l.*," and as "the sum of 15,000*l.*:" Held, that the children of A. B. were entitled to the accumulated interest only, and not to the capital sum of 15,000*l.* *id*

2. A testator directed his widow to carry on his business, until his youngest child should attain twenty-one; and, for that purpose, gave her the "entire use, disposal and management of the capital, stock and effects which should be in, due and owing or belonging to him, in his said trade," at the time of his decease; and he authorized his executors to augment the capital employed therein; the executors renounced, and the widow took out administration; Held, that the specified property of the testator only was liable to the debts contracted by the widow in carrying on the trade. *Cutbush v. Cutbush*, 184

3. A testator having three places of residence at A., B. and C., bequeathed the one at A. to his nephew; and also "all his carriages, horses, implements and his live and dead stock and chattels" in and about the house and premises at A.; "and also his household goods and furniture, pictures, plate, linen, china, liquors of all sorts and brewing vessels, and likewise his watches and personal ornaments;" Held, that the household goods, furniture, &c., at B. and C. passed by the bequest;—but whether a bust would pass under the latter words, *quære?* *Willis v. Curtois*, 189

Manuscript notes of a physician, of his attendance on a patient, and which were bound up in volumes, Held to pass under a bequest of "all and every my books in and about my house" at A. *id*

A pocket-book and a case of instruments, usually carried about the person of a testator, Held not to pass under the words "personal ornaments;"—but whether a gold pencil-case, tooth-pick case, lip-salve box and eye-glass,

similarly circumstanced, would pass, *quære?* *id*

4. Bequest of testator's estate, to be equally divided between his children on attaining twenty-one, with a power of advancement "from their respective portions" of the testator's estate. A child survived, but died under twenty-one; Held, that he took a vested interest. *Vivian v. Mills*, 315

5. A testator devised an estate to A., subject to the payment of 5*s.* a week to B.; and in case B. should leave any children, he charged the estate with the payment of 5*s.* weekly to such children, until they should attain twenty-one; and he further charged the estate with the payment of 100*l.* "to the child or children of B., when and so soon as he, she or they should respectively attain the age of twenty-one," equally to be divided: with a gift over to the issue of any of them dying under twenty-one; B. had one child who attained twenty-one, and B. being still living; Held that the 100*l.* became raiseable for his child immediately on her attaining twenty-one. *Pearse v. Catton*, 352

6. A testator bequeathed to his daughter and her husband 300*l.*, and directed, if the husband should be indebted to him at the time of his death, the debt should be deducted out of his legacy. The husband died in the lifetime of the testator, indebted to him in 250*l.*, and the testator afterwards died; Held, that the debt was not to be deducted from the daughter's legacy. *Davis v. Elmes*, 131

7. A testator bequeathed the residue amongst his five grandchildren A., B., C., D. and E., his grandson A.'s two children F. and G., and his niece's two children H. and K.; and declared, that "in case any of the said last-mentioned children should die before their attaining their respective ages of twenty-one and should leave no lawful issue, then the survivors were to have his or her share." F. died under twenty-one, and left no issue; Held, that his share became divisible between the eight surviving legatees, children and grandchildren. *Walker v. Moore*, 607

8. The testator desired his daughter's share to be secured in the funds, and for his trustee to pay her the dividends; and he wished that neither the principal or interest of the funds should be subject to the control of any husband she might marry, but that the same should stand subject to her will only, properly executed, whether covert or sole, at her decease; Held, that the daughter took an absolute interest for her separate use. *Tawney v. Ward*, 563

9. A testator having given property to his wife while unmarried, and after her decease to his children "then living:" Held, that the children living at that time alone would take, unless it appeared upon the construction of the whole will, and to effectuate a clear intention appearing in other parts of it, that the words "then living" ought to be rejected as repugnant, or to be qualified in order to give effect to other words inconsistent with them. *id*

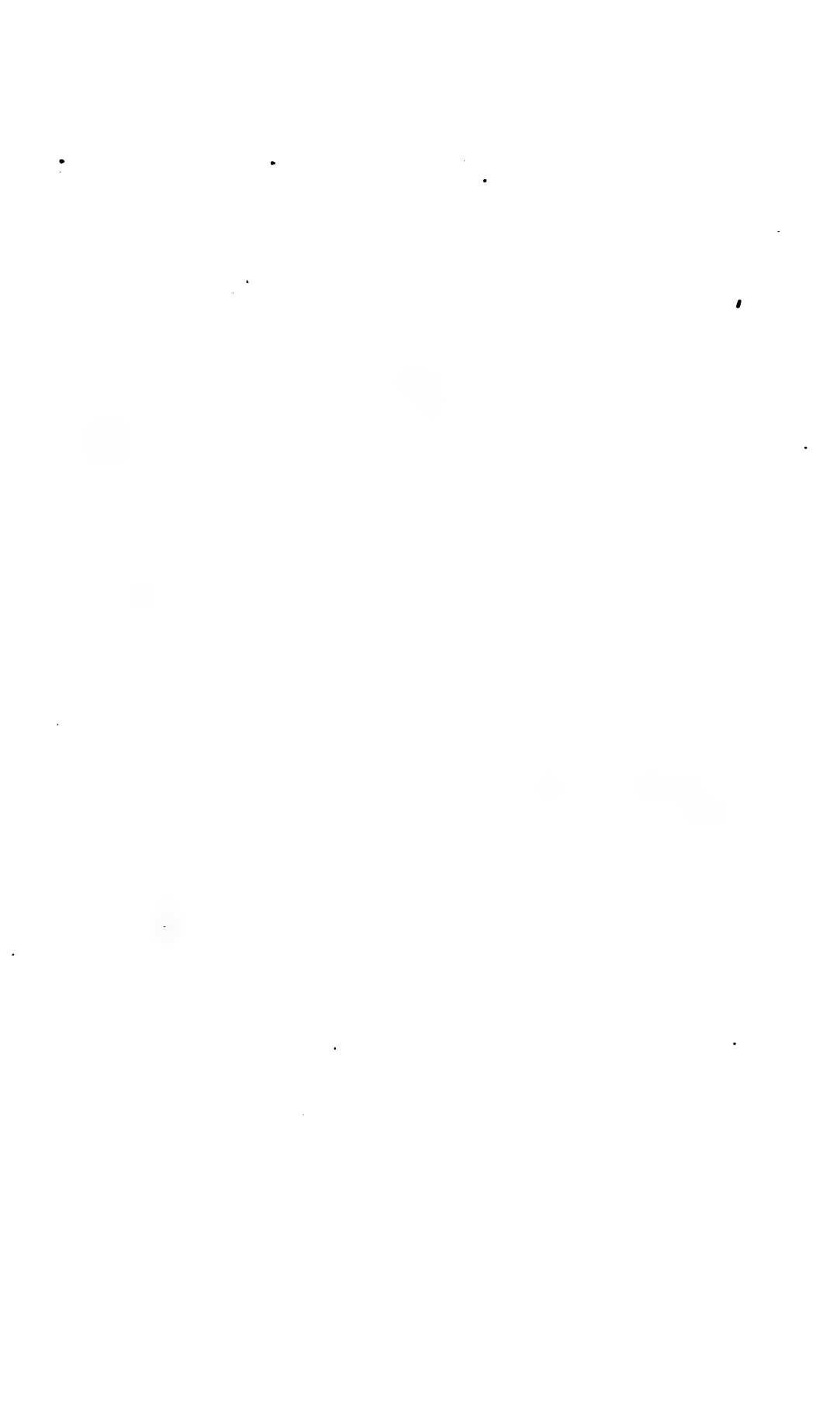
A testator, having three children, gave his property to his wife so long as she lived un-

married, and if she married and her children resided with her an allowance was to be made to her; and "after her decease the testator bequeathed his property equally between his children then living;" he directed his farm to be allotted as part of his son Thomas' share, and "he wished whoever might enjoy his farm, if unfortunately his children should fail

of heirs," should take his name; and he directed his daughter's share to be secured for her separate use. The son died in the life of the mother: Held, that he took no interest in the property. *id*

See CONDITION. CUMULATIVE LEGACY. DEVISE, 2, 3, 4. HUSBAND AND WIFE. INTEREST ON LEGACY. TRUSTEE, 7. ESTATE FOR LIFE.

END OF THE FIRST VOLUME.



REPORTS
OF
CASES IN CHANCERY,
ARGUED AND DETERMINED IN
THE ROLLS COURT
DURING THE TIME OF
LORD LANGDALE,
MASTER OF THE ROLLS.

BY CHARLES BEAVAN, ESQ., M. A.
BARRISTER AT LAW.

WITH NOTES AND REFERENCES,
TO BOTH ENGLISH AND AMERICAN DECISIONS.
BY JOHN A. DUNLAP,
COUNSELLOR AT LAW.

VOL. II.
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SIR LANCELOT SHADWELL, VICE-CHANCELLOR.

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SIR ROBERT M. ROLFE, SIR THOMAS WILDE,
SOLICITORS GENERAL.

THE
OFFICE OF THE
SECRETARY OF THE
NAVY
WASHINGTON, D. C.
JANUARY 1, 1900

TO THE
HONORABLE
MEMBERS OF THE
NAVY
DEPARTMENT
WASHINGTON, D. C.

MEMORANDA.

ROBERT BAYNES ARMSTRONG and David Dundas, Esqs., were, in February, 1840, appointed her Majesty's Counsel.

Serjeants Adams, Andrews, Storks, Ludlow, Bumpas, Goulburn and Talfourd received patents of precedency, conferring upon them the same rank which they held under the warrant of King William the Fourth.(a)

William Glover and Stephen Gazelee, Esqs., were, in Trinity vacation, 1840, called to the degree of Serjeants at Law.

Sir George Rose, Knt., one of the Judges of the Court of Bankruptcy, was appointed one of the Masters in Ordinary of this Court, in the room of Lord Henley, deceased.

William Wightman, Esq., was, in Trinity Term, 1841, appointed one of the Judges of the Court of Queen's Bench, in the room of Sir Joseph Littledale, Knt., resigned.

Sir John Campbell, Knt., her Majesty's Attorney General, was, in Trinity vacation, 1841, appointed Lord High Chancellor of Ireland, and created Baron Campbell.

(a) See 6 Bing. N. C. 232.



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GENERAL ORDER.

Parties obtaining stop orders to be liable, at the discretion of the court, to pay costs, &c.
Stop orders may be obtained without service of the petition upon the parties to the cause, or upon persons interested in parts of the funds not sought to be affected.

IT IS ORDERED, That in all cases where any stocks or funds are or shall be standing in the name of the Accountant General of the Court, to the general credit of any cause, or to the account of any class or classes of persons, and an order shall be made to prevent the transfer or payment of such stocks or funds or any part thereof, without notice to the assignee of any person or persons entitled in expectancy or otherwise to any share or portion of such stocks or funds, the person or persons by whom any such order shall be obtained, or the shares of such stocks or funds affected by such order shall, at the discretion of the Court, be liable to pay any costs, charges and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or any person interested in any such stocks or funds; and, henceforward, any person presenting a petition for any such order as aforesaid shall not be required to serve such petition upon the parties to the cause, or upon the persons interested in parts of the stocks or funds not sought to be affected by any such order.

April 3, 1841.

COTTENHAM, C.
LANGDALE, M. R.
LAUNCELOT SHADWELL, V. C.

NOTE.—The stop order, as now drawn up by the Registrars, is prefaced with a submission on the part of the assignee to be bound by this order of the 3d of April, 1841.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE ROLLS COURT.

WARING v. WILLIAMS.

1839 : May 17, 25, 28.

A husband became liable for bills of costs due from his wife, *dum sola*, and from her former husband, to a solicitor : Held, that though the relation of solicitor and client did not exist between the solicitor and the second husband, yet, that the latter was entitled to a taxation of the bills of costs.

A bill of costs, nearly the whole of which had been paid, contained items unconnected with professional employment, as for a horse, &c. : Held, that the solicitor ought, in taxation, to have credit for such items (if due,) although they had not become due to him in the character of solicitor.

THIS was a petition of Richard Abram, praying for a reference to the Master, to tax such of the bills of costs delivered by Henry Rumsey Williams to the petitioner, as related to business done by him as attorney and solicitor of the petitioner's wife, after the decease of David Jones, her first husband, and before her marriage with the petitioner ; or if the court should be of opinion, that the petitioner was liable upon all the bills of costs delivered to him, then that the whole might be taxed, with such directions as the nature of the case might require.

It appeared that Henry Rumsey Williams had acted as the attorney and solicitor of David Jones, the first husband of Mrs. Abram, and that bills of costs were due *to him, on that account, when David Jones died in [*2] the year 1826.

Mrs. Jones, now Mrs. Abram, was the legal personal representative of her first husband, and was liable, out of his assets, to pay what was due to Mr. Williams for his bills of costs or otherwise ; and she employed Mr. Williams, to some extent, as her solicitor, and in that respect costs became due from her to Mr. Williams.

In December, 1831, Mrs. Jones was about to marry the petitioner, Mr. Abram ; she was possessed of considerable property, of which a part was settled and other part was transferred to Mr. Abram. Whether any part of this

1839.—*Waring v. Williams.*

property was derived from the assets of Mr. Jones was not stated ; but it appeared that at the time of her second marriage she admitted that she was considerable indebted to Mr. Williams ; and representing that her second husband was in want of money for his trading concerns, she requested Mr. Williams to give time for payment, and Mr. Williams acceded to that request.

The bills of costs related to business done for Mr. Jones, and after his death for Mrs. Jones during her widowhood : they were seven in number, and amounted altogether to 530*l.* They were delivered to Mr. Abram on the 26th of October, 1832, and a letter written to Mr. Williams by Mr. Abram on that occasion, showed that the latter considered himself liable to pay what was due. He asked further indulgence, which was given, and it did not appear that Mr. Williams used any pressure for payment till the autumn of 1837, when applications for payment were renewed by Mr. Sheffer on behalf of Mr. Williams, and a payment of 514*l.* was made ; and one question [*3] on the argument was, whether this was a *final settlement. The circumstances under which the payment was made were stated by Mr. Sheffer in his affidavit, to the effect that the petitioner having sold a certain quantity of wine of the value of 514*l.* and received the purchaser's acceptance for that sum, endorsed it over to Henry Rumsey Williams, and delivered it to the deponent, who remitted it accordingly to Henry Rumsey Williams ; and deponent thereupon, on behalf of Henry Rumsey Williams, signed and gave a receipt for the sum of 514*l.* to Richard Abram ; " that very soon after the receipt of the bill of exchange by Henry Rumsey Williams, he, H. R. Williams, informed deponent that he would receive the same in full satisfaction of all his bills of costs and other demands then delivered against Richard Abram."

Mr. Williams, in his affidavit, stated the above circumstances as to the endorsement of the bill ; and " that he, Henry Rumsey Williams, informed Thomas Sheffer that he would receive the same in full satisfaction of all his demands against Richard Abram on account of his said bills of costs so delivered as aforesaid."

The receipt given to Mr. Abram was thus expressed :—

" 8th of September, 1837.

" Received, of Mr. Richard Abram, the sum of 514*l.*, on account of a bill of costs due from him and Elizabeth his wife (late Elizabeth Jones) to Mr. Henry Rumsey Williams, of Penrhos in the county of Carnarvon, attorney at law.

" For H. R. Williams,

" £514 0 0.

Thomas Sheffer."

The bills of costs contained an item of 42*l.*, for the price of a horse sold by Mr. H. R. Williams to Mr. Jones, and it also contained charges for moneys lent.

[*4] *Mr. *Pemberton*, and Mr. *Keene*, in support of the petition, suggested that the petitioner was not liable for the bills of costs for business done in the lifetime of David Jones.

 1839.—*Waring v. Williams.*

Mr. *G. Richards* and Mr. *Cockerell*, contra, on behalf of Mr. Williams, objected to any taxation, on the ground, first, that the bills were never taxable at the instance of Mr. Abram, between whom and Mr. Williams the relation of solicitor and client never subsisted; secondly, that the bills had been admitted to be correct, and had been finally settled and paid, and ought not now to be subject to taxation.

Vincent v. Venner(a) was cited on behalf of the petitioner.

May 28.—THE MASTER OF THE ROLLS:—Neither the affidavits of Mr. Williams and Mr. Sheffer nor the receipt show that this transaction, or arrangement as it is called, was a final settlement of account, or that the 514*l.* was received as full satisfaction of all that was due to Mr. Henry Rumsey Williams; Mr. Abram does not appear to have had any reason so to consider it, but Mr. Williams says he told Mr. Sheffer, his own agent, who confirms the statement, that he, Williams, would receive the 514*l.*, in full satisfaction of all his demands on account of his bills of costs. (His Lordship stated the points argued.)

Under the circumstances proved in this case, I am of opinion that the petitioner did become liable to pay the bills of costs for business done for David Jones; and upon the authority of the cases cited in the argument

*I am of opinion that the bills were taxable at his instance. [5]

I am further of opinion, that although the bills were delivered in October, 1832, and were, therefore, in the possession of the petitioner for nearly five years before September, 1837, yet that the arrangement and payment then made was not a final settlement of the bills as between the petitioner and Mr. Williams; the bills were in the hands of the petitioner, and a payment was made on account, but no final settlement, no release, and no delivery up of vouchers took place, and under the circumstances, I think the bills ought to be now taxed.

It appears that one of the bills contains a charge of 42*l.*, for a horse sold to Mr. Jones; this is not a proper item to introduce into a bill of costs, and yet may have been a sum justly due from Mrs. Abram as executrix of Jones; it ought not to be struck out.

In taking the account of what is due, the respondent is to have credit for such sums as were contained in the bills, and were justly due from Mr. Jones and Mrs. Abram, or either of them, although the same did not become due to Williams in his character of solicitor.[1]

(a) 1 Myl. & K. 212.

[1] Vide *Jones v. James*, 1 Beav. 307.

 1839.—*Lewis v. Fullarton.*

[*6]

**LEWIS v. FULLARTON.*

1839: May 30, July 16.

A work consisting partly of compilations and selection from former works, and partly of original compositions, may be the subject of copyright.

The defendant having published a book consisting of matter pirated from the plaintiffs' work intermixed with original matter, the court, without waiting till the whole of the pirated parts could be ascertained, enjoined the defendant from publishing his book containing any articles pirated from the plaintiffs' work.

THIS was a motion made on behalf of the plaintiffs, for an injunction to restrain the defendant, his agents, servants and workmen, from further printing, publishing, selling, delivering or otherwise disposing of any copies of a book called "A New and Comprehensive Gazetteer of England and Wales," published by the defendant, or any part thereof.

Mr. *Pemberton*, Mr. *Kindersley* and Mr. *Hardy*, in support of the motion.
Mr. *Spence* and Mr. *Bacon*, contra.

July 16.—THE MASTER OF THE ROLLS (after stating the terms of the notice of the motion):—The plaintiffs are the publishers of a work called "The Topographical Dictionary of England." It was prepared for publication at a very great expense, and with great literary assistance, and is, according to the evidence, a work consisting partly of compilations and selections from former works, and partly of original compositions, obtained for the plaintiffs at their own cost; and the plaintiffs allege, that such parts of their work as consist of compilations and selections have been subjected to investigation and inquiry in the localities to which they relate. There is no doubt but that a work of this nature may be the subject of copyright; and on consideration of the evidence adduced in this case, I am of opinion, that for the purposes of this motion, I must consider the plaintiffs as entitled to the copyright which they claim. The first edition of the plaintiffs' work was published in the month of May, 1831. It seems that some of the copies were corrected or varied in passing through the press, so that there are some differences between the copies of the plaintiffs' work, which constituted their first edition.

A second edition was published in December, 1833, and a third in June, 1835.

The printing of the defendant's work was commenced in the month of June, 1832, and it was completed in May, 1834. The plaintiffs having obtained a considerable sale for their work, were informed about the end of the year 1837, that the sale was interfered with by a Scotch work. In February, 1838, they were informed that this Scotch work was the defendant's Gazetteer; and upon examination of the work about June, 1838, the plaintiffs, as they allege, first discovered the piracy of which they now complain, and against which they seek to be protected. It has been attempted to be shown on the part of the defendant, that the plaintiffs must have been aware of the

1839 —Lewis v. Fullarton.

publication and contents of the defendant's work at a much earlier period, and ought, by their laches, to be now precluded from asking for an injunction; but on reading the evidence as to this point, I think it appears that the plaintiffs, although they had previously been informed of the title of the defendant's publication, did not know the character and contents of it till June, 1838; and as the bill was filed in the following month, there does not appear to have been any improper or unnecessary delay.[1]. On a comparison of the two works, it appears, and has necessarily been admitted, that a considerable portion of the matter which is contained in the plaintiffs' work has found its way into the work of the defendant; for the defendant *insists that with respect to such parts of the plaintiffs' work as are [8] not original, he had a right to go to the sources to which the plaintiffs had previously resorted; that with respect to such parts of the plaintiffs' work as are original, a lawful use has been made of them,—the compiler has taken nothing *animo furandi*, but made only a fair use of a former publication on the subject of his own subsequent work.

It is said that the defendant's book was undertaken by his late father, who employed Mr. James Bell to prepare it for the press; and Mr. Bell was supplied with a great number of topographical and other works, and amongst others, with the plaintiffs' topographical dictionary; that a fair use was made of all, and the plaintiffs have no right to complain of what has been done.

Any man is entitled to write and publish a topographical dictionary, and to avail himself of the labors of all former writers whose works are not subject to copyright, and of all public sources of information; but whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves, for their own profit, of other men's works still subject to copyright and entitled to protection; and the question is, whether Mr. Bell did or did not, for the compilation of the

[1] Delay is a ground for refusing an injunction. Thus, on a motion by the above plaintiffs, against other defendants, for piracy in another work, from their Topographical Dictionary, Lord Langdale, M. R. says: "The two works were preparing for publication at the same time. The publication of the defendant's began first, and the attention of the plaintiffs' was drawn to it at the commencement, and afterwards during the progress of the defendant's publication, which was completed six years and a half before the bill was filed; and for more than one year before the bill was filed, a complete copy of the defendant's work was in the possession of the plaintiffs, and had been obtained by the plaintiffs' for the express and avowed purpose of investigating the contents, and comparing them with the contents of the plaintiffs' work, and the contents of Fullarton's book, which was under consideration here. The delay of the plaintiffs is accounted for by reasons which affect them and relate to their own convenience only. In the consideration of the case, I have seen no reason to doubt the plaintiffs' copyright, &c.; yet it appears to me that the plaintiffs having so strong an interest in the subject, having such powerful motives for vigilant attention, and having such means of information, cannot be allowed in a court of justice to state that they remained ignorant of that which they had the perfect means of knowing, and which it was their avowed purpose, as well as their strong interest to learn; and under these circumstances I think it my duty to impute to them such a knowledge of the contents of the defendant's work as made it their duty to apply for an injunction, if at all, at a much earlier period. *Lewis v. Chapman*, 3 Beav. 133; and see 2 Sim. & Stu. 10, n. 1; 3 Myl. & Cr. 736, n. 1.

1839 — *Lewis v. Fullarton.*

work in which he was engaged, avail himself of the plaintiffs' work unlawfully, and in violation of the plaintiffs' copyright.

For the purpose of ascertaining this, I have read a very considerable number of articles in both works; the trouble of comparing them has been greatly diminished by the exhibits which have been prepared on both

[*9] *sides; and the result of the examination appears to me to show that

Mr. Bell, in the compilation of his gazetteer, has extensively, and as far as my examination has gone, it would not be too much to say habitually, made use of all that suited his purpose in the plaintiffs' work; it is evident, that in a large proportion of the defendant's work, no other labor has been applied than in copying the plaintiffs' work, and arranging the matter in the form which best suited the purpose of the compiler. Mr. Bell has evidently thought himself under no restraint, and probably did not think that the plaintiffs were entitled to any copyright; and if that which he did could be considered as lawful, it is plain that no protection whatever could be given to any work in the nature of a gazetteer, dictionary, road book, calender, map or any other work the subject matter of which is open to common observation and inquiry; and that every man who had bestowed any amount of labor or expense in collecting and arranging the information requisite for the production of such a work, might immediately on its publication, be deprived of the fruit of his industry and ability. Having gone carefully through all the articles commented upon in the argument, and several others, I am of opinion that the defendant's work is, to a very considerable extent, a piracy of the plaintiffs' copyright.[1]

To what extent it is so is not fully or accurately ascertained; and it appears to me that there are parts of the defendant's work, which, in a publication of this nature, may justly be considered as original; certainly there are parts which are not taken from the plaintiffs' work, and as to which, if they stood alone, the plaintiffs would have no right to an injunction.

[*10] *Under these circumstances, the difficulty which pressed on the mind of Lord Eldon, in *Mawman v. Tegg*,^(a) arises in the present case. What was true in that case cannot be altogether denied in the present; "that notwithstanding all the pains which have been used, the inquiry, as to how much has been pirated, has left us in a great degree to conjecture, or rather we are left to conclude, from passages which are shown to have been copied from the original work, how much more has been so copied." And if it be correct to say, as Lord Eldon appears to have intimated, that the court ought not to grant an injunction against the whole or the pirated parts of a work, without first ascertaining, either by its own inspection or otherwise, what was the quantity of matter pirated, then undoubtedly it would follow that an injunction ought not now to be granted: for this reason only, that

(a) 2 Russ. 385.

[1] As to the mode of comparing the two works, see *Sweet v. Maugham*, 11 Sim. 51; stated in a subsequent note, p. 14

 1839.—*Lewis v. Fullarton*.

though a considerable part of the work appears to have been copied, yet as the two works have not been compared in every part, it does not appear, on the whole, how much has been copied, or on the whole, what part of the defendant's work with regard to the plaintiffs' work at least, can be considered as original. In the case I have mentioned, Lord Eldon made a very special order: but I cannot help entertaining some doubt, whether that order could have been acted on with advantage to either party.[1] The parties, however, did not prosecute it, and the report adds, the suit was compromised by the payment of a considerable sum of money by the defendant to the plaintiffs.

I conceive, that when it has been once ascertained that the defendant has in any degree violated the right of the plaintiff, the nature and extent of the order to be made must depend on the circumstances of the [*11] cases, and the amount and extent of the evidence adduced. The piracy proved may be so inconsiderable, and so little likely to injure the plaintiff, that the court may decline to interfere at all, and may leave the plaintiff to his remedy at law ;[2] or the piracy proved may be extensive in a greater or less degree,—such as to leave it extremely doubtful whether the parts not examined are in any degree piratical, or such as to make it more or less probable that they have been composed in the same manner, collected from the like sources as the parts which have been examined, and are in an equal degree liable to the charge of piracy.

The hardship of restraining, or doing that which is equivalent to restraining the whole of a work, when part of it consists of original matter, has always been urged in cases of this nature, and the answer which is given by Lord Eldon, in the case to which I have already referred, seems conclusive: "If the parts which have been copied cannot be separated from those which are original without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing; if a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the other parts of the work cannot be separated, and if by that means the injunction which restrained the

[1] It may well be doubted "whether that order could have been acted on with advantage to either party." To carry out its provisions must have been attended with great expense; enough perhaps to absorb the value of the matter in controversy; with the certainty that each party must sustain expenses which could not be brought into the general costs of the suit; and with the uncertainty what might be the ultimate disposition of the general costs. It is, therefore, not surprising, when we examine Lord Eldon's complex and embarrassing order, that the parties were willing to come to a compromise.

[2] Vide 2 Kent's Comm. 383, n. b., where *Bell v. Whitehead*, in the English Chancery, 1839, is referred to. 2 Sim. & Stu. 10, n. 1.

 1839.—*Lewis v. Fullarton.*

publication of my literary matter prevents also the publication of his own literary matter, he has only himself to blame.”[1]

[*12] *In cases of this nature, it must be observed, that nothing but an injunction can sufficiently protect the injured party. In the same case Lord Eldon has observed that, “though keeping an account of the profits may prevent the defendant from deriving any profit, as he may ultimately be obliged to account to the plaintiff for all the gains, yet if the work which the defendant is publishing in the meantime really affects the sale of the work which the plaintiff seeks to protect, the consequence is, that the rendering the profits of the former work to the complaining party, may not be a satisfaction to him, for what he might have been enabled to have made of his own work, if it had been the only one published; for he would argue, that the profits of the defendant, as compared with the profits which he, the plaintiff, has been improperly prevented from making, could only be in the proportion of the price of a copy of the one book to the price of a copy of the other.” On the whole, for the reasons thus stated, it appears to me, that an injunction ought to be granted, whenever it appears, by sufficient evidence, that a copyright exists, and that piracy has been committed to an extent which is likely to be seriously prejudicial to the plaintiff; and that the extent of the injunction must depend on the amount of proof and the nature of the work. The plaintiffs in the present case ask for an injunction, to restrain the defendant from publishing the whole or any part of the defendant’s gazetteer. As it appears from the evidence that there are parts of the defendant’s gazetteer which are not borrowed from the plaintiff’s work, I cannot grant an injunction in those terms; and it becomes a question, whether an injunction should be granted in general terms against such parts as have been pirated, or whether means should be taken to ascertain what particular parts have been pirated, in order that the publication of those particular parts may be *restrained. Now it appears to me, not, it must be admitted, by absolute proof and demonstration, for the two works have not been examined in every part, but upon proof and demonstration as to part, and as to the rest by strong inference and presumption, arising from the proof given as to those parts to which the proof applies, and from the nature of the work and the circumstances under which it is proved to have been composed, that if the parts pirated were taken away, though some articles would remain in their entirety, yet the greater number would be left in a state so imperfect and incomplete, that the defendant’s work would lose its distinctive and useful character as a gazetteer.

If the defendant were desirous to avail himself, as he has an undoubted right to do, of any original matter of his own, or of any matter which he has fairly taken from other sources, he would, I think, be under the necessity of

[1] If a party so confounds the property of another with his own, that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon him, and it is for him to distinguish his own property, or lose it. *Hart v. Ten Eyck*, 2 Johns. Ch. Rep. 109.

1839.—Lewis v. Fullarton.

recomposing his work for the purpose of separating that which appears to me to have been improperly taken from the plaintiffs' work. Lord Eldon says, (a) "In the cases which have come before me, my language has been, that there must be an injunction against such part as has been pirated, but in those cases the part of the work which was affected with the character of piracy was so very considerable, that if it were taken away, there would have been nothing left to publish except a few broken sentences;" and it was because the evidence before him did not enable him to approach sufficiently to that result, that he made the particular order which he did in that case.

But in this case, having availed myself of the evidence which has been so industriously collected during the long time that this motion was pending, and having *read with great care all the affidavits laid before me, [*14] and more particularly the affidavits of Mr. Holliday and Mr. Cunningham, I think I have reasons on which I ought judicially to act, for considering, that the parts of the works which have been examined and compared, afford fair indications of the nature and character of those parts of the works which have not yet been examined and compared; and it appearing to me, under these circumstances, that if the parts affected with the character of piracy were taken away, there would be left, I cannot say nothing but a few broken sentences, but there would be left an imperfect work, which could not, to any useful extent, serve the purposes of a gazetteer, I think that I ought to grant an injunction, to restrain the publication of the parts which are pirated, without waiting till all the parts which have been pirated can be distinctly specified; and therefore the order which I shall make will be: let the defendant, his agents, servants and workmen be restrained from further printing, publishing, selling or otherwise disposing of any copy or copies of a book called "A New and Comprehensive Gazetteer," &c., containing any articles or article, passages or passage, copied, taken or colorably altered from a book called "The Topographical Dictionary of England," published by the plaintiffs.[1]

(a) 2 Russ. 399.

[1] "A copyright may exist in part of a work, without having an exclusive right to the whole. Gray's Poems were collected and published, with additional pieces, by Mason; and Lord Bathurst protected, by injunction, the unauthorized publication of the additions. So, Lord Hardwicke restrained a defendant from printing Milton's Paradise Lost, with Dr. Newton's notes.—A person cannot under the pretence of quotation, publish either the whole, or any material part of another's work; but he may use, what is in all cases very difficult to define, fair quotation. A man may adopt part of the work of another. The *quo animo* is the inquiry in these cases. The question is, whether it be a legitimate use of another's publication, in the exercise of a mental operation, deserving the character of an original work. If an encyclopædia or review should copy so much of a book, as to serve as a substitute for it, it becomes an actionable violation of literary property, even without the *animus furandi*. If so much be extracted as to communicate the same knowledge as the original work, it is a violation of copyright. It must not be in substance a copy. An encyclopædia must not be allowed by its transcripts, to sweep up all modern works. It would be a recipe for completely breaking down literary property." 2 Kent's Comm. 381, 382, 383, and cases there cited. See also *Campbell v. Scott*, 11 Sim. 31, from the judgment in which case, some extracts will be found in the Editor's note, 3 Myl. & Cr. 728, where he is made to cite a book which

1839.—Thompson v. Byrom.

[*15]

*THOMPSON v. BYROM.

1839: February 16, 23, 25.

An answer filed on the morning on which a motion is made to extend the common injunction is not sufficient to prevent its being extended.

A bill stated, that judgment had been obtained at law, and prayed an injunction to stay execution; the court of law afterwards set aside the judgment, and let in the defendant at law to plead; a motion being made to extend the common injunction to stay trial was under these circumstances, refused.

ON the 16th of February, a motion was made to extend the common injunction to stay trial, when the answer of the defendant, which had been filed that morning, was shown as cause and allowed by the Master of the Rolls.

Exceptions were afterwards taken to the answer, and one was allowed; and on the 23d of February, the motion to extend the common injunction was renewed. Notice of trial of the cause had been given for the 18th of February, and it was now objected on the part of the defendant, that the plaintiff, applying on the eve of trial, came too late and was not entitled to extend the injunction; *Blacoe v. Wilkinson*, (a) *Field v. Beaumont*. (b)

Mr. *Pemberton*, for the plaintiff.

Mr. *Bazalgette*, for the defendant.

THE MASTER OF THE ROLLS on that ground refused the application, but without costs.

On the 25th of February Mr. *Pemberton* obtained leave to mention the case again, for the purpose of bringing the following authorities to the attention of the court, viz. *Whitehouse v. Hickman*, (c) *Ibbottson v. Booth*, (d) *Munnings v. Adamson*. (e)

has, as yet, no existence, viz: 5 Edw. Ch. Rep. As to the frame of the bill, or affidavit, on which an injunction is sought, and the subsequent proceedings, *Shadwell, V. C.*, on a motion to dissolve an injunction granted *ex parte*, stated: "As long as I remember the court, it never has been thought necessary for a party who complains that his copyright has been infringed, to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work; but it has been always considered sufficient to allege, generally, that the defendant's work contains several passages, which have been pirated from the plaintiff's work; and to verify the rival works by affidavit. Then, when the injunction has been moved for, the two works have been brought into court, and the counsel have pointed out to the court the passages which they rely upon as showing the piracy. As it is quite plain that an injury has been done by the defendants, I shall continue the injunction as it now stands, and let the plaintiffs bring such action as they may be advised. I shall not fix any time for bringing the action; but, in order to guard against delay in commencing or proceeding with it, I shall give each party liberty to apply." *Sweet v. Maugham*, 11 Sim. 51. See further 2 Russ. 405, n. 1. 2 Sim & Stu. 10, n. 1. *Saunders v. Smith*, 3 Myl. & Cr. 711, 728, n. 1, 736, n. 1, 737, n. 1. *Bramwell v. Hulcomb*, id. 737. *Grey v. Russell*, 1 Story's Rep. 11.

(a) 13 Ves. 454. (b) 3 Mad. 102. S. C. 1 Swan. 204. (c) 1 Sim. & Stu. 102. (d) Id. 103.

(e) 1 Sim. 510.; 1 Smith's Ch. Pract. 613. [The authority of *Munnings v. Adamson*, is questioned by Wigram, V. C. who, speaking to the case of *Thompson v. Byrom*, says, "I do not find that Lord Langdale, in that case, followed or had occasion to follow, the precedent of *Munnings v. Adamson*." *Scotson v. Gaury*, 1 Hare, 102.]

 1839.—Thompson v. Byrom.

*Mr. *Bazalgette*, contra, in addition to the point previously relied [*16] on by him, insisted that the plaintiff now attempted to make out a case different from that stated on the record, for the bill stated "that the defendant had proceeded to judgment and threatened to sue out execution," and it prayed an injunction to restrain the defendant *from issuing execution*. That it had happened, however, that the Court of Queen's Bench had set aside the judgment, which had been obtained by default, and had permitted the defendant in the action to plead; that the defendant now sought to restrain the plaintiff at law from proceeding to trial, which was inconsistent with the frame of his bill, which only sought to restrain execution.

THE MASTER OF THE ROLLS :—I was mistaken in thinking, that an answer filed on the day on which the motion was made, was sufficient to prevent the extension of the common injunction; I believe I ought to have required it to be shown, that the answer had been filed at least on the previous evening. It appears from the cases cited, that to prevent a serious injury, the court will sometimes look into the answer to see if it is sufficient, and be governed by its own opinion.

In this case I must refuse the application, in consequence of the statement in the bill which has been referred to by the defendant's counsel.[1]

[1] It is not the practice of the court to look into the answer to an injunction bill, for the purpose of determining whether the answer is sufficient, without exceptions having previously been taken thereto, notwithstanding the answer may be filed so near the day of trial, that it is probable the trial will be had before the proceedings can be stayed by the result of a reference in the usual course. If the answer were a mere pretence and evasive, it might be otherwise. If, in such case, the answer is excepted to for insufficiency, the court will look into the exceptions and the answer, *instantly*, without referring them. *Scotson v. Gaury*, 1 Hare, 99. In that case, Wigram, V. C., says, (p. 104,) "The facility with which the court allows injunctions to be obtained to stay proceedings at law is such, that it is bound to look at its practice with strictness. The plaintiff files his bill, which it may be impossible that the defendant should answer in the time prescribed by the practice of the court. At the expiration of that time, the common injunction issues as of course, and the plaintiff is at liberty to move upon an affidavit, which, by the practice of the court, the defendant is not allowed to answer, to extend the common injunction to stay trial. The court, therefore, is bound to see that the plaintiff, who claims the benefit of such a practice, shall give the defendant the benefit of every safeguard which has been established for his protection."

 1839.—Hobson v. Bell.

[*17]

*HOBSON v. BELL. GLYNN v. BELL.

1839: February 18, 19, 25.

On a purchase from a mortgagee, of a fund standing in the name of trustees, it is not an essential blot on the title, that notice of the incumbrance was not given to the trustees, if it can be shown, that no subsequent incumbrancer has given notice.

Whether the title to a trust fund is bad, where in consequence of the death of trustees, information cannot be obtained from them of the incumbrances of which they had received notice? *Quere.*

A sale was made by a mortgagee under a power, subject to certain special conditions (stated in the text :) Held, that they were not of such a depreciating character as to invalidate the sale.

All objections to a title were to be taken within twenty-one days from the delivery of the abstract, or be deemed waived, and time was, in that respect, to be considered the essence of the contract: Held, that the twenty-one days did not begin to run, until a perfect abstract had been delivered.

A mortgagee had a power of sale in case of default being made in payment of mortgage money: Held, that the unsupported solemn declaration, under the 5 & 6 W. 4, c. 62, of the mortgagee alone, of a default having been made, was not sufficient evidence of that fact, as between vendor and purchaser.

The certificate of a stockbroker, of a fund standing in the bank, held insufficient evidence of that fact as between vendor and purchaser.

THIS suit was instituted by a vendor against a purchaser, for the specific performance of a contract for the purchase of a reversionary interest in a sum of 3000*l.* consols.

It appeared that William Welch, by his will dated in 1798, gave to three trustees certain property, in trust for sale, and to invest the produce in the 3 per cents, and to place the same to the stock then standing in his name in the books of the Governor and Company of the Bank of England, and apply the same in the manner thereafter mentioned. The trusts thereof (as determined by the court on this occasion) were for the testator's widow, Ruth Welch; for life, with remainder to William Welch, the son, absolutely. The testator appointed his three trustees and Ruth Welch his executors.

By an indenture dated the 25th of March, 1822, made between William Welch of the one part and William *Hobson of the other part, after reciting the will and death of the testator, the proof of his will by all his executors, and that the testator at the time of his decease was possessed of 3000*l.* 3 per cent. imperial bank annuities, standing in his name in the books of the Governor and Company of the Bank of England, and then standing in the name of Thomas Plant as surviving trustee under the will of the testator William Welch, William Welch mortgaged his reversionary interest in the 3000*l.* imperial bank annuities for securing 1310*l.* 13*s.* stated to be due upon a judgment obtained by William Hobson in 1817. The mortgage was made subject to a proviso for redemption on payment of the principal, by half yearly instalments of 35*l.*, with interest at 5 per cent. The deed contained a power enabling the mortgagee, his executors, &c., in case of non-payment of any of the said instalments or of the interest, to sell the reversionary interest, either by public auction or private sale, for such price as

1839.—Hobson v. Bell.

could reasonably be gotten for the same, and upon payment of the purchase money to give proper receipts for the same, which it was declared should be good discharges to the purchasers, who should not be answerable for any loss, misapplication or non-application thereof; and out of the money, after paying the expenses, the mortgagee was to retain the principal sum of 1310*l.* 13*s.* and all interest then unpaid, and to pay the residue to the mortgagor.

William Hobson died in August, 1831, and the plaintiff, Anne Hobson, was his executrix.

Default (as was alleged by the plaintiff) having been made in payment of the instalments, the plaintiff put up for sale, by auction, the reversionary interest in the 3000*l.*, which was described as, 3000*l.* being part of *3100*l.* three per cent. consolidated bank annuities standing in the [*19] books of the Bank of England in the names of trustees under the will of Mr. William Welch, deceased.

The property was not sold, but was purchased by private contract by the defendants on the 13th of October, 1835, subject to certain special conditions of sale.

The fourth condition of sale was as follows: "The vendor shall deliver an abstract of title to the purchaser, or his solicitor, within two days of the day of sale, to the stock in question, and all *and every objection* to the title *shall be made* and communicated in writing to the vendor's solicitor *within twenty-one days* after the delivery of the abstract, and if the same be found valid the vendor shall be at liberty to rescind the contract on returning to the purchaser his deposit money; *but all and every objection* to the title *not so taken* and communicated within such period of twenty-one days from the delivery of the abstract aforesaid *shall be deemed waived* and in this respect, time shall be considered the essence of the contract."

There were further conditions, to the effect that the purchaser should not require any other person than the vendor to join in the assignment, that all copies of deeds, &c., should be obtained at the expense of the purchaser, that any mis-statement, &c., should not annul the sale but should be the subject of compensation; and that on the purchasers failing to comply with the conditions, a resale might be made, and that the deficiency should be made good by the purchaser.

Within the two days from the day of sale, the vendor's solicitor delivered an abstract of title, in which, however, material portions of the will of the testator were *omitted, and which was also imperfect in other particulars. [*20] The only evidence of the identity of the stock was the certificate of a stockbroker, that there was then standing in the bank books the sum of 3100*l.* in the joint names of the three trustees of the will of the testator; and the only evidence, of such a default in payment as to give the executrix of the mortgagee power to sell, was the solemn declaration of the executrix herself under the 5 & 6 W. 4, c. 62, that the sum of 1310*l.* 13*s.* with interest from the date of the mortgage, except the first quarterly payment,

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was then due on that security. The three trustees of the testator's will were stated to be dead, and a Mr. Plant was stated to be the survivor, but no evidence was produced as to these facts, except the recital in the mortgage deed.

A bill being afterwards filed by the vendor for the specific performance of the contract; a reference was then made to the Master as to the title, who reported that the plaintiff had made out a good title to the property, and that the plaintiff had delivered a perfect abstract previous to the filing of the bill.

The defendant took exceptions to this report, which now came on for argument.

Mr. *Pemberton*, Mr. *Blunt* and Mr. *Joseph Humphry*, in support of the exceptions.

Mr. *Kindersley* and Mr. *Rudall*, contra.

Several questions arose on the argument of these exceptions of which the following were the principal :

First whether the declaration of the plaintiff was sufficient proof of [*21] the power of sale having become *exercisable, it being said that the declaration of the party interested was insufficient. In answer to this *Corder v. Morgan*,^(a) *Clay v. Sharpe*^(b) were cited, in which cases it was observed a similar objection might have been, but was not, raised.

Secondly, whether the certificate of the stockbroker was sufficient evidence of the stock being then standing in the bank, and whether the recital in the mortgage deed was sufficient evidence of the identity of the stock and of the trusts on which it was held. On this point it was observed, that it was the present practice of the Bank of England to allow no information to be given as to the amount of stock in their books.

Thirdly, it was objected by the purchaser, that as the priorities of incumbrancers, on trust funds, depended on the order in which they gave notice to the trustees; and as the trustees of the will were dead, it was now impossible for the purchaser to ascertain whether the trustees had received notice of any other incumbrances besides that of the plaintiff; that the plaintiff's title was therefore necessarily bad, or so doubtful that the court would not force it on a purchaser, *Price v. Strange*.^(c)

Fourthly, it was said, that the conditions of sale were so depreciating as to amount to a breach of trust.^(d) *Ord v. Noel*.^(e)

Fifthly, the plaintiff insisted, that it was not competent for the purchaser to insist on any objection to the title which had not been communicated in writing within twenty-one days from the delivery of the abstract.

[*22] *Sixthly, it was argued on behalf of the defendant, that supposing the court to entertain any of the objections raised, the vendor, who was here a plaintiff, would not be entitled to any further inquiry as to the title; on this *Fildes v. Hooker*,^(g) *Portman v. Mill*^(h) were cited.

(a) 18 Ves. 344. (b) 2 Sug. Vend. 337. (c) 6 Mad. 164. (d) 9 Jarman's Byth. 406, note. (b)
(e) 3 Mad. 438. (g) 2 Mer. 429. (a) 1 Russ. & M. 696.

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February 19.—THE MASTER OF THE ROLLS, as to the first objection, said that the power of sale arose in the event of default being made in payment of the instalments, the only evidence of which was the unsupported declaration of the plaintiff, an interested party; that the case cited did not apply, and that in the absence of an authority, he could not hold that there was sufficient evidence that the event had happened on which the right of exercising the power of sale was to arise.

February 25.—THE MASTER OF THE ROLLS (at the conclusion of the arguments on the other points) said, the principal question which I have to decide is, whether this matter is to be referred back to the Master.

The defendant has raised many objections to the title, and alleges that their nature and the conduct of the plaintiff with regard to them are such, as to disentitle her to the indulgence of a farther inquiry.

With regard to all those objections, I am certainly of opinion that the plaintiff has not performed that which was her duty. In the first place, I think she has not done what she ought, in respect of proving the indentity of the stock: it is impossible to rely on the certificate of a stock-broker, as the only evidence for the *purpose of showing that the [*23] stock is standing in the name of certain trustees. It is not easy to connect the 3000*l.* imperial stock stated in the deed (supposing the deed to be evidence that there was 3000*l.* imperial stock,) with the stock standing in the name of the testator at the time of his death, and which it is alleged was subsequently converted into 3100*l.* three per cents. I think the purchaser was entitled to evidence of the identity of the stock, and also that it was subject to the trusts of the will, for on that the vendor's title depends: this not having been produced, the defendant is entitled to further evidence on that point.

With respect to the trustees, and the notice given to them, this, undoubtedly, is a question of very great magnitude; and, whenever it comes to be decided, it must be decided after the most careful consideration. I do not, however, understand, that in a transaction of this kind, it is an essential part of the title of the vendor to show that notice has been given to the trustees of the fund; such notice is important, in order to prevent a subsequent purchaser or incumbrancer from obtaining priority; [1] but if no other purchaser or incumbrancer has given notice, then it does not appear to me to be

[1] Vide *Dearl v. Hall*, and *Loveridge v. Cooper*, 3 Russ. 160, n. 1. *Foster v. Hargreaves*, 1 Keen, 287. *Timson v. Ramsbottom*, 2 Keen, 35, 49, n. 1; 53, n. 2. *Foster v. Blackstone*, 1 Myl. & K. 297. *Jones v. Jones*, 8 Sim. 643. *Meux v. Bell*, 1 Haro, 73. *Meek v. Kettlewell*, id. 473. 1 Keen, 169 n. 1. 2 Sim. 263 n. 1. It is not necessary to give notice of an equitable incumbrance to more than one of several trustees of the property, so long as the circumstances of the case remain unaltered by the death of that trustee, or his continuing to act as such trustee or otherwise. *Meux v. Bell*, ubi supra. A valuable extract from this case will be found in the Editor's note, 2 Keen. 49.

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material that the plaintiff has given no such notice of his deed. . The object of notice is to exclude a subsequent purchaser and incumbrancer on the fund ; and if it can be shown that no subsequent party has come in, then the fact that notice has not been given, would not, as it seems to me, be an essential blot on the title. It is, however, necessary that full means should be afforded of most carefully inquiring whether notice has or has not at any time been given to the trustees ; hence it becomes important to know, who were the persons filling the character of trustees from time to time.

[*24] This has not been shown, neither has the time *when the several trustees died been proved, nor who was the survivor. It is said that this proof is not necessary, because an application was made by the purchaser to the party who was stated by the vendor to be the representative of the last surviving trustee. The application was naturally made to the person pointed out by the vendor, but that by no means renders it unnecessary to ascertain that the representation was really correct. No evidence whatever has been given that Plant was the surviving trustee ; if he was not, the title, so far as it depends on that matter, is good for nothing.

With regard to the breach of trust which is alleged, I cannot say that I very satisfactorily follow the argument which has been used on that subject nor can I say that these conditions of sale are of such a depreciating character as to amount to a breach of trust, or constitute an objection to this title.

By the conditions of sale the vendor was to deliver an abstract of title to the purchaser, within two days from the day of sale ; an abstract was delivered within that time, which was imperfect, not only in the particulars adverted to on a former occasion, but plainly imperfect in most, if not all, of the particulars mentioned in the third exception to the Master's report. To say that the time for making objections should run from the time of delivering that imperfect abstract, from which it could not be ascertained what objections there might be, appears to me extremely unreasonable. The objections could only be taken when a proper opportunity had been given for taking them, or when a perfect abstract had been furnished to the purchaser, and such an abstract has not yet been delivered. By the conditions, all objections to the title are to be made within twenty-one days from the [*25] delivery of the abstract, that is, *within twenty-one days from a time which has not yet arrived ; the conditions also provide, that all objections not so taken within such period of twenty-one days from the delivery of the abstract shall be deemed waived, and that time shall be considered the essence of the contract, as to the waiver of objections not taken within that time. It appears to me, that upon the construction of these conditions, and having regard to the abstract delivered, time cannot be considered as having been made of the essence of the contract.[1]

[1] It is competent for parties to make time of the essence of the agreement. *Benedict v. Lynch*, 1 Johns. Ch. Rep 370. Neither from the statement of the facts, in the case in the text, nor from the judgment of the Master of the Rolls, does it clearly appear, how, upon the construc-

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The plaintiff I consider to have acted wrong : she has refused to produce the evidence which appears to me ought to have been produced ; but on the

tion of the conditions of sale, time was *not* to be considered as of the essence of the contract. The real question was, from what period were the twenty-one days for objecting to the title to be computed ? And the answer is satisfactory ; from the delivery of such an abstract as the court would deem sufficient. An imperfect abstract is no abstract at all. For aught that appears, this might have been a case in which it would have been competent for the vendee to put an end to the contract, after due notice. *Taylor v. Brown*, post 180. In a case in which the conditions of sale provided that all objections to the title disclosed by the abstract, not taken within a certain time after delivery of the abstract to the purchaser must be deemed to be waived ; it was held, that the time for objecting was not to be computed from the time of the delivery of an imperfect abstract ; and that the purchaser was not precluded from taking an objection which arose out of evidence called for before the expiration of the time fixed. The sale in this case took place under a decree. The abstract stated that the person at whose death the sale was to be made, proved the will of the testator, but it did not state the pleadings in the cause, or whether that person was living or dead ; it was held, that this was not a sufficiently distinct intimation to the purchaser that the time of sale had, without any sufficient ground, been anticipated. In his judgment in this case, Wigram, V. C., says : " The abstract does not contain the pleadings in the cause ; the pleadings were called for by the purchaser's counsel on the 12th of March, before the expiration of the twenty-one days ; and on the 5th of April, after the expiration of that time, the vendors' solicitors tender the brief for inspection at their office. If it has in truth been out of the inspection of these pleadings that the objection has arisen, it would be impossible for the vendors successfully to contend that it was not competent to the purchaser, after the twenty-one days, to insist upon an objection to the title arising out of the inspection of a document which had been called for within that time. But this is the state of the case between the parties, unless the contents of the abstract are such as to deprive the purchaser of any argument founded upon the difference of the information disclosed by the abstract. The court must anxiously protect the purchaser. The question must be, whether as a conclusion of fact, the court is satisfied the purchaser intended to waive and has waived his objection to this defect in the title. And in a question between the purchasers and vendors only, I cannot hold that he has done so, unless the contents of the abstract are such as clearly to raise the present objection. It was by the pleadings [in the cause in which the decree was made, under which the defendant purchased,] and only by the pleadings, that the defect in the title really appeared. But in truth the abstract does not state that the widow survived the testator, except incidentally in stating another fact,—the probate of the will ; and the decree as abstracted, purports duly to carry into effect, not to vary, the trusts of the will as expressed therein. In these circumstances, and looking at the evidence before me, I think myself bound to hold, in a question between the vendors and purchasers before conveyance, that the abstract does not so point to the facts out of which the present objection arises, that I can consider the purchaser as having waived it. The abstract itself did not raise the objection, and if it did, the objection is established by the evidence which the purchaser called for before the twenty-one days expired." *Blacklow v. Laws*, 2 Hare, 40. The cases of *Tanner v. Smith*, 10 Sim. 410, and *Morley v. Cook*, 2 Hare, 106, have a very important bearing upon the present topic. For a very full statement of the latter case, see the Editor's note 10 Sim. 412, n. 2. Where in a contract for the sale of land, a day is fixed for the conveyance of the property, if the vendee wishes to object to the title he must give notice of his objections a reasonable time previous to the day fixed for making the conveyance, to enable the vendor to remove the objections to the title and to make the conveyance at the time specified, or a Court of Equity may consider a strict performance of the contract on the specified day, as waived ; and where the vendor has not been guilty of gross negligence in perfecting his title, equity may decree a specific performance, upon a bill filed by him, although the title was not perfected on the specified day ; unless the time of perfecting the title is by the terms of the contract, made an essential part of the agreement. *More v. Smedburgh*, 8 Paige, 601.

1839.—Wordsworth v. Wood.

whole, the plaintiff is not, in my opinion, to be precluded from having a further inquiry, if she thinks she can produce sufficient evidence to remove the objections which have been raised to the title.[2]

WORDSWORTH v. WOOD.

1839 : April 13, 17.

A testator gave to his wife, for life only, all his freeholds, &c., as also his capital in trade, for her life, but nevertheless in trust, at her death, "for his then surviving children, share and share alike, independent of the rental of his said estates," which he gave "to his surviving female children;" and he proceeded thus:—"on the decease of any of the children, should they die without issue, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, from the last female child to the males of my body:" Held, that the children of a daughter of the testator, who survived him but died in the life of the widow, took no interest under the will

THIS case came before the court on general demurrer.

The testator by his will dated in 1827, after giving certain directions and making some dispositions of his property, proceeded as follows:—

[*26] "I do give and bequeathed to my dear wife Mary Wood, in trust for her life only, all my remaining estates, freeholds, leaseholds, ground rents and reversions, rent charges, plate, linen and the household furniture in the houses at Westminster and Park House, parish of Hayes, county of Middlesex, with the pictures and any particular article she may be desirous of from my estates in Devonshire, as also I leave, give and bequeath to my said dear wife all my capital in trade, with the three quarters of the profits arising therefrom, for her life, but nevertheless in trust, at her death, *for my then surviving children*, share and share alike, independent of the rental of my said estates, which I give and bequeath *to my surviving female children*, to be paid them as follows, by my executor, Joseph Carter Wood, or his heirs or assigns, that is to say, the whole rents and produce, share and share alike, of all such freeholds, leaseholds, ground rents and reversions, rent charges, plate and household furniture as before mentioned, but to have no power to sell, mortgage or in any way whatsoever to incumber the same; on the contrary the rents of which I direct may be received by my executor, Joseph Carter Wood, and paid by him to them one month after each quarter-day, that is to say, on the 25th of January, the 25th of April, the 24th of July, and 29th of October, in each year, so carrying the balance forward to the next quarter; on the decease *of any of the children*, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from the last female child to the males of my body lawfully begotten, with the same restrictions as before ex-

[1] As to directing a further inquiry in matters of title, see *Sidebotham v. Barrington*, 4 Beav. 114.

• 1839.—Wordsworth v Wood.

pressed, and to the heirs and assigns of the last of them. But be it remembered my daughter, Mrs. Eliza Johnstone, is exempt from any benefit arising from this will, the said Mrs. Johnstone having *had her share [*27] of my property at her marriage, namely an annuity of 200*l.* per annum, which I do hereby likewise provide for, to be paid quarterly, from my share of three quarters of the profits of the Westminster brewery."

By a codicil the testator expressed himself as follows: "And be it understood the horses requested to be sold at Devonshire does not include the carriage horses: and also if my exeutors should think proper to buy up Eliza Johnstone's annuity, the 4000*l.* so paid must be secured by trustees to the said Eliza Johnstone, for her own sole use and benefit independent of her husband, and at her death to her children."

The testator died soon after date of his will, and Georgiana, one of his daughters, died in 1837, in the lifetime of the widow, leaving the plaintiffs, her children, surviving her.

The widow of the testator was still living, and the question raised by the demurrer was, whether the plaintiffs' under these circumstances took any interest under the will.

Mr. Tinney, and Mr. W. C. L. Keene, for the plaintiffs.

Mr. Pemberton, and Mr. Bethell, in support of the demurrer.

Cripps v. Wolcott,^(a) *Thornhill v. Thornhill*,^(b) *Smith v. Smith*,^(c) *Giles v. Giles*,^(d) *Rust v. Baker*^(e) and see *Lejeune v. Lejeune*,^(g) *Christopherson v. Naylor*,^(h) *Butler v. Ommaney*,⁽ⁱ⁾ *Waugh v. Waugh*,^(k) *Tytherleigh v. Harbin*,^(l) *Doe dem. Long v. Prigg*,^(m) *Bowen v. Scowcroft*,⁽ⁿ⁾ were cited.

April 17.—THE MASTER OF THE ROLLS:—The plaintiffs are the children of the testator's daughter Georgiana, who died in the lifetime of the testator's widow, and the question is if they take any interest under the testator's will.

The will of the testator, after making certain bequests, is expressed as follows: [his Lordship stated it.] He afterwards made this codicil: [his Lordship stated it.] And the question is whether this gift to the children of the children applies to the children of the daughter who died in the lifetime of the widow. The testator has expressed himself in a very confused and imperfect manner: he has given to his wife, in trust for her life only, all his remaining estates, freeholds, &c., and in the same sentence he gives all his capital in trade with the three quarters of the profits arising therefrom to his wife for life, but nevertheless in trust at her death *for his then surviving* children, share and share alike; it is perfectly clear, that if the will had stopped here the children surviving the wife would alone have taken; but then the testator proceeds, "independent of the rental of my said estates, which I give and bequeath to my surviving female children," by which he

(a) 4 Mad. 11.

(b) 4 Mad. 377.

(c) 8 Sim. 353.

(d) Id. 360.

(e) Id. 443.

(g) 2 Keen, 701.

(h) 1 Mer. 320.

(i) 4 Russ. 73.

(k) 2 M. & K. 41.

(l) 6 Sim. 329.

(m) 8 Barn. & C. 231.

(n) 2 Younge & C. 640

1839.—Goodwin v. Clewley.

excludes the rental of the estate from the former particular disposition ; and he then makes a distinct disposition of this rental in these words : “ which I give and bequeath to my surviving female children, to be paid them [*29] as follows *by my executor, that is to say, the whole rents and produce, share and share alike, of all such freeholds, leaseholds, ground rents, &c., plate and household furniture.” It is to be observed, that the plate and household furniture had not been before excepted, and this shows the extreme confusion of mind in which the testator was when he wrote this will. The question is, if I can construe the words “surviving female children” to be any other than those he speaks of in the preceding sentence. If he intended the words “surviving children,” to mean the same as those in the line preceding, then those children only who survived the widow would be entitled, and I think that must be the construction. The rule is, that where an interest is given to one for life, and after his death to his surviving children, those only can take who are alive at the time the distribution takes place. I regret I am compelled to come to this conclusion, for most probably such was not the intention of the testator, but in all cases of this description the testator rarely intends to omit any branch of his family, by contemplating future events imperfectly, he fails to provide for all, and unfortunately omits the particular event which afterwards occurs : I am under necessity of allowing this demurrer.

Mr. *Tinney* pressed upon his Lordship's attention the terms of the gift over, but his Lordship considered that the children mentioned in it meant the same children as had been previously described, namely, those surviving the death of the widow.(a)

[*30]

*GOODWIN v. CLEWLEY.

1839 : June 28, 29.

A suit was instituted, by a party entitled in remainder, against a trustee, to make him responsible for a trust fund invested on an improper security, and a decree was made for its restitution : Held, that in this suit the tenant for life, who was a defendant, was not entitled against his co-defendant, the trustee, to an account of the interest which had accrued pending the suit, there being no such case made by the pleadings.

THE testator gave a sum of 1000*l.* to his widow for life, with remainder to the plaintiffs ; and he appointed the defendant Clewley and his widow executors. After the testator's death the money was received by Clewley, who invested the same on an improper security ; the widow did not, however, appear to have concurred therein.

The object of this bill was to make Clewley personally liable for the amount, and the widow was made a defendant. At the hearing, the Master

(a) Affirmed by the L. C. 4th December, 1839, [but without costs. The case, on appeal, is reported, 4 Myl. & Cr. 641.]

1839.—Pickering v. Pickering

of the Rolls was of opinion, that the security was improper, and that the defendant Clewley was personally responsible: he was accordingly ordered to restore the fund, with costs.

Mr. *Pemberton*, and Mr. *Piggott*, for the plaintiffs.

Mr. *F. J. Hall*, for the widow who was tenant for life, asked for an account against Clewley, of the arrears of interest received by him since the filing of the bill; this was asked by her answer, but the point was neither raised by the bill, nor was there any admission on the subject in the answer of Clewley.

Mr. *Wright*, contra, for the defendant Clewley, opposed this account.

THE MASTER OF THE ROLLS, though desirous of making the order, said that no such case was made by the pleadings, and in the absence of an authority, he could not *make the order asked, as it would be making [*31] a decree between co-defendants.(a)

PICKERING v. PICKERING.

1839: April 10, 12.

A testator bequeathed to his widow "all the interest, rents, dividends, annual produce and profits, use and enjoyment of all his, the testator's real and personal estate" for life, and at her decease he gave to E. R. P. "all the rest and residue of his estate and effects whatsoever, both real and personal." Held, on the context of the will, that the widow was entitled to the enjoyment during life, of the perishable property of the testator "*in specie*," and without a conversion for the benefit of the remainder-man.[1]

An account between an aged tenant for life and the remainder-man (who was also executor) which was settled and signed by the tenant for life, under the advice of her solicitor, set aside, on the ground of the executor not having furnished full information—of the account being founded on an erroneous opinion of counsel as to the rights of the parties, obtained *ex parte* by the executor,—and of the account being complicated in its form, and though professing to be made in conformity with the opinion, yet containing an addition of a purchase and sale between the parties.

When parties, whose rights are questionable, have equal knowledge of facts and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective claims among themselves, every court feels disposed to support the conclusions or agreements to which they may fairly come at the time, and that notwithstanding the subsequent discovery of common error.

THERE were two questions in this case, *first*, whether, under the terms of the testator's will, the tenant for life was entitled, as against the remainder-

(a) See *Eccleston v. Lord Skelmersdale*, 1 Beavan, 396, and *Trevelyan v. White*, ib. 588. [That a decree may be made between co-defendants where the pleadings and proofs will permit it, see *Holton v. Lloyd*, 1 Moll. 30. *Elliot v. Pell*, 1 Paige, 263. *Templeman v. Fountleroy*, 3 Randolph's (Virginia) Rep. 434. *Bradley v. Root*, 5 Paige, 642.]

[1] The point decided is better stated in the synopsis of the report of this case, on appeal; (4 Myl. & Cr. 289;) viz: "where leaseholds or other perishable property is included in a gift of all the testator's estate and effects to one person for life, with remainder over after his decease, the property is not to be converted into money at the testator's death, if the will contains indications of an intention that the tenant for life should enjoy the property in its existing state."

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man, to enjoy the testator's perishable property *in specie* or whether at the testator's death it ought to have been converted into 3 per cents for the benefit of the defendant, who was entitled to the testator's property in remainder; and *secondly*, whether an account signed and approved of by the tenant for life was, under the circumstances which will be presently stated, binding on the plaintiff, who was her legal personal representative.

[*32] *It appeared that George Andree by his will, dated in December, 1800, expressed himself as follows: "I give to my dear wife Mary 100*l.* for mourning and immediate expenses; besides which, in lieu and satisfaction of and for the provision made for her previous to and in contemplation of our marriage, and subject to and after payment of my debts, and the sums of money and legacies hereinafter given, and such annuities and insurances as I am liable to pay, I give and bequeath to my said wife *all the interest, rents, dividends, annual produce and profits, use and enjoyment of all my estate and effects whatsoever, real and personal, for and during the term of her natural life.* I give to my said wife all my wearing apparel whatsoever, to be disposed of at her discretion."

The testator then gave certain legacies, and gave to the defendant, Edward R. Pickering, "100 guineas and all his books (with the exceptions after mentioned,) and all his papers, except title deeds and securities; and he gave to him, absolutely, all his furniture, fixtures and things in and about his chambers in Staple's Inn," which chambers he gave to him, his heirs and assigns. The testator then proceeded as follows: "I give to my said wife, for her absolute use and benefit, all the rest of my household furniture, wine, coals and other stores, linen and china, and fifty volumes of my books, to be selected by herself, folios excepted, but only the use for her life of my plate." The testator then appointed the defendant and two other persons his executors, and continued in the following words: "I direct that all the said legacies be paid and delivered as soon as it may be without any delay; and at the decease of my said wife, I give, devise and bequeath unto my said son-in-law,

Edward R. Pickering, all the rest and residue of my estate and effects [*33] whatsoever, both real and personal, to hold to him, his heirs, *executors, administrators and assigns for ever, subject as aforesaid, and to the payment of such sum and sums of money as I have undertaken or shall undertake to pay after my said wife's decease; but if the said Edward Rowland Pickering shall die in her lifetime, not having married, then I give one half part of such rest and residue of my estate and effects, subject to the payment of one half of such sum and sums first and last above alluded to, unto my nephew, John Andree, and my niece, Mary A. Andree, equally to be divided between them, to hold to them or the survivor, if one only shall survive my wife, their, his and her heirs, executors, administrators and assigns, for ever."[1]

[1] In the report of this case, upon appeal, Andree's will is stated in full. A mode of reporting, which is, in a case of so much interest as the present, the most satisfactory course.

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In January, 1801, the testator made the following codicil to his will: "being liable to pay to John Cook, of Leigh, in the county of Essex, clerk, the sum of 60*l.* a year, during the term of his natural life, now I hereby expressly charge and make payable, the same upon, by and out of all lands, tenements and hereditaments, both freehold and copyhold, which I am or shall be, or which I, my heirs or assigns shall be entitled to, situate at or near Stevenage in the county of Herts; and in case of the decease of John Clendon, assured by me in the Amicable Assurance Office, during the lifetime of the said John Cook, then I give unto my executors all such sums of money as shall arise and be payable by and from the said society, on the decease of the said John Clendon, to me, my executors, administrators or assigns, upon trust thereout from time to time to pay and discharge to the said John Cook, during his natural life, the said sum of 60*l.* a year, for his own use and benefit."

The testator died in February, 1801, and the defendant Edward R. Pickering, a solicitor, who was the son of Mrs. Andree by a former marriage, alone proved the will.

*The testator, at his death, was possessed of a leasehold house in the [*34] Strand, held for an unexpired term of forty-five years and a half, and producing a clear improved rent of 103*l.* He was also entitled to an annuity of 100*l.* a year, payable by George Green during his life, and which was secured by the covenant of one William Ward; this annuity at the death of the testator was in arrear to the extent of 1622*l.*, and was supposed to be irrecoverable, in consequence of the insolvency of the grantor and of the supposed insolvency of the estate of Ward, the surety, who was dead. Greene it appeared died in 1825, and nothing was paid in respect of this annuity until the year 1830, as hereafter stated.

From the death of the testator in 1801, down to the year 1830, no question seemed to have arisen between the parties as to the construction of the will; but the widow, with the full concurrence of the defendant, continued to receive the whole of the rents of the leasehold property in the Strand.

In the year 1827, a suit was instituted, in the names of Mrs. Andree and the defendant, against the representatives of Ward the surety, for the recovery of the arrears of the annuity; in this suit a Mr. Johnson acted as the solicitor of the plaintiffs. In February, 1830, a decree was made in that suit, in favor of the plaintiffs, by which accounts of the arrears of the annuity and of Ward's estate were directed to be taken, and the latter was to be applied in payment of such arrears, and of the other debts of Ward.

Arrears to the amount of 4047*l.* 5*s.* 8*d.* were found to be due; the cause was heard on further directions on the 14th of August, 1830; and the defendant received the arrears on the 28th of the same month.

*No questions appeared to have arisen between Mrs. Andree and the [*35] defendant until the first decree was about to be made, at which time the correspondence between them commenced. On the 13th of February, 1830, Mrs. Andree wrote to the defendant, complaining of the delay in the

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settlement of the suit, and casually mentioning that a Mr. Grojan had called on her. The defendant replied on the 27th of that month, stating that the cause had been heard, and that a decree had been made, which admitted the claim notwithstanding the length of time which had elapsed; and also mentioning the reference to the Master, but that it was impossible to state when the end would be, but that he left it to Mr. Johnson.

Nothing further appeared to have taken place until the month of March, 1830, when the defendant submitted a case for the opinion of the late Mr. Bell, as to the construction of the will of the testator. It did not appear under what circumstances the case was submitted, or whether with the knowledge or concurrence of Mrs. Andree. The case and opinion, in which the names of the parties were altered, was as follows:—

“CASE.

“George Andrews by his will bequeathed to his wife all the rents, interest, dividends and annual produce of his estates for her life; and subject thereto, he bequeathed all the rest and residue of his estates, real and personal, to Edward Parsons, his heirs, executors, administrators and assigns for ever; and appointed three executors, who are all dead but one. 1801, George Andrews died. Part of his property consisted of a lease, for fifty years from 1796, at a clear rent of 103*l.* per annum. The widow is still living, and has received the whole rent. The residuary legatee has now complained, [*36] *that the executors ought not to have suffered the widow to receive the full rent, but they ought to have sold the lease at the testator's death, realized its then value, and only to have let the widow have what interest could have been obtained from the produce; but not doing so, he contends that he has been greatly injured; he insists, that if this lease had been sold at the testator's death, it would have produced 1854*l.*, and that if it were now sold, it would only be worth 1133*l.*, and therefore this property is worse by 721*l.* than it would have been had the executors sold this leasehold property and realized the assets, as they ought to have done, at the testator's decease in 1801; and insists that the deterioration should be made good by the widow, either by now making up the value as it would have been at the testator's death, or that the future rents, &c., be stopped to make it good, but of which there would be little chance as the widow is in very advanced years; but she is in good circumstances and could easily make good the claim, or out of the sum to which she may be entitled from the annuity mentioned on the other side.”

“Be pleased to give your opinion on this leasehold question and the rights of the parties.

“Second point. Upon George Andrew's death in 1801, it was found that he had purchased an annuity of 100*l.* of the assignee of the grantee, upon the grantor's life, and that William Watts was a covenantor for securing it.

“1801. It then appeared that Watts was dead insolvent, and upon application to the grantor it was found that he was living upon the charity of his

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friends and could pay nothing, that only a small payment had been made to the first grantee, and that Andrews had not received any part.

*“1825. The grantor died lately, and it has been found that Watts [*37] has become entitled to some property; his representative has been called upon under his covenant, and it is expected that the whole or a considerable part of the arrears may be obtained.

“The whole arrears due 4047*l.* 5*s.* 8*d.*

“The widow claims to be entitled to the annuity from the death of her husband in 1801, viz., twenty-four years or 2400*l.*, and to have the residue laid out at interest for her life.

“On the other hand the residuary legatee insists, that she is not entitled to any part of the arrears, that it never has been an annual productive property, and that not until it is received by the executor will it be, that personal of which she can derive any interest, and that therefore all that she is entitled to, will be, to have the gross sum which may be obtained laid out at interest, to be paid to her for life in future. The executor has suggested that it should be considered thus, supposing the whole 4047*l.* could be obtained, or proportionably according to the sum which may be so:—The arrears due at Andrews’ death in 1801 £1647

That the then value of an annuity of 100*l.* upon the grantor’s life would have been worth, suppose 1100

That this sum should be considered as the realized assets or estate in 1801 2747

That the widow should have the difference, and from which should be deducted the excess received by her from the leasehold. 1300

£4047

*“But both parties disagree to this arrangement, the widow thinking that she ought to have the 100*l.* per annum since the year 1801, viz. 2400*l.*, as accrued arrears to her, and the residuary legatee insisting, that she ought to have nothing of the arrears, but only the future interest of the gross sum of whatever may be obtained, and that subject to the residuary legatee’s claim in respect of the lease should be adjusted out of the widow’s claim to the annuity.

“Be pleased to give your opinion upon this point, and what you recommend to be done between the parties.”

On the 20th of March, 1830, Mr. Bell gave his opinion, which was in the following terms: “I think the leasehold should be considered as sold at the testator’s death, and the widow will be entitled to what it would have produced if then laid out in 3 per cent. consols, and she must refund the rest of what she has received for the rent, *Earl Howe v. Earl Dartmouth*,^(a) for this is a residuary bequest to the widow for life. The arrears at the death

(a) 7 Ves. 137.

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of the testator must be carried to the account of the residue, and the widow can have no benefit from it till it begins to produce interest. As to the residue of the arrears, that is, what the annuity has produced from the death of the testator, and according to *Lord Howe v. Dartmouth*, it should be computed what 3 per cent. consols the value of the annuity would have produced if laid out at the death of the testator, and what the widow would have received from dividends of such stock, should be paid to her out of what has accrued since his death, and the residue of that sum should be taken [*39] as part of the principal belonging to the residue. If the whole arrears are not recovered, I incline to think the sums recovered must be apportioned rateably, according to what would go to each account if the whole had been recovered."

On the 3d of August, 1830, the defendant wrote to Mrs. Andree in the following terms:—

"With this I beg leave to send you the account, which has been drawn out agreeably to the opinion of Mr. Bell, respecting the house in the Strand and the arrears of Greene's annuity now recovered from Mr. Ward's estate. A copy of Mr. Bell's opinion accompanies the account, that you may put them both into Mr. Grojan's hands or into those of any other professional man in whom you have any confidence, that they may be carefully considered on your behalf. I must request that he will be pleased to see Mr. Johnson upon the subject, and as soon as I learn that the account has been adjusted and approved by you, the balance shall be paid."

The account which accompanied this letter was as follows:—

[*40] *Dr. per contra. Cr.

The Estate of George Andree deceased, in account with Mrs. Andree,

AS TO THE HOUSE IN THE STRAND.

Mr. Bell being of opinion that the house ought to be considered as if sold at Mr. Andree's death—that the amount of the then value should be considered as then invested in the 3 per cent. stock—that Mrs. Andree should be credited with what would have been the amount of the dividends of such 3 per cents, and that she must refund what she has over received by having received the rents.

	£	s.	d.		£	s.	d.
At the death of Mr. Andree in February, there were 45½ years to come in the lease of No. 128 Strand: the value of this lease in 1801 was 15½ years' purchase, viz: 1596l. 10s., being let at a clear rent of 103l. per annum: this sum would have purchased 2660l. 16s. 8d. 3 per cent. consols, at 60 per cent. Annual dividend of this 79l. 16s. 6d.; 29 years and ½ thereof				To the amount of rents of the Strand house, at 103l., paid to Mrs. Andree from Christmas, 1800, to Midsummer day, 1830. 103l. × 29½ years			
						3038	10 0
To balance carried down							
	£3038	10	0				
						£3038	10 0

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*AS TO GREENE'S ANNUITY—ARREARS FROM WARD'S ESTATE. [*41]

Mr. Bell being of opinion that the arrears due at Mr. Andree's decease were to be considered as part of his personal estate—that the annuity should be considered to have been sold or valued at the death of Mr. Andree—that such value should be considered as then invested in the purchase of 3 per cents., and that Mrs. Andree should be credited with the amount of what the dividends would have been from Mr. Andree's death, the rest of what is recovered from Ward's estate as to the arrears of the annuity will be part of the residuary estate.

	£	s.	d.		£	s.	d.
At Mr. Andree's decease, George Greene, the annuity grantor, was about sixty-four years of age, and as he was insolvent, the annuity would not have produced any thing; but estimating it at that period as a good annuity of 100 <i>l.</i> , it would have been worth about 7½ years' value, say 8 years or 800 <i>l.</i> : this would have purchased in 3 per cents., at 60 per cents., 1333 <i>l.</i> 6 <i>s.</i> 8 <i>d.</i> 3 per cents., and would have produced 40 <i>l.</i> per annum; and as Greene died in June, 1825, 40 <i>l.</i> × 24 years							
	960	0	0				
The amount of arrears	£4047	5	8	To the above balance brought down	£103	0	0
Deduct the above	960	0	0	Suppose that Mrs. Andree shall continue for her life to receive the full rent of the Strand house as heretofore, the difference between that rent and what would have been the dividend from the stock if a sale had been made, viz:	79	16	6
	£3087	5	8	Difference	23	3	6
				Value	2½ years		
Estimate this at 3½ per cent, or	£108	1	0				
Value thereof on Mrs. Andree's life at	2½			To balance to be paid to Mrs. Andree			
		270	2 6		488	10	6
	£1230	2	6		£1230	2	6

N. B. The price of stocks during the year 1801, varied from 58 to 72 per cent. The above estimate is made at only 60 per cent.: but if it were taken at a mean value, as probably it should be, viz: 65 per cent., it would make the balance upwards of 200*L*. less to be paid to Mrs. Andree than as above stated.

*The following are the material portions of the correspondence which subsequently passed between the defendant and Mrs. Andree. [*42]

Mrs. Andree to defendant, dated 31st August, 1830. "I am just risen from a bed of sickness; my limbs are feeble, and my head is too weak to understand the contents of the papers you have sent me. What am I to do with law proceedings, with one foot in the grave—nearly both. I should think, that as executor, you would do me justice on every point, and surely

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your own religious feelings would not permit you to wrong me. According to your request, Mr. Grojan waited on Mr. Johnson. Mr. Grojan's family I respect, having known them from the age of two years. Mr. and Mrs. Grojan, with his sisters, pay me friendly visits; but I wish to have nothing to do with law. I have a great opinion of Mr. Johnson; but why are you not sufficient to act for me during the short remaining period of my life? I wish you to explain more in the A. B. C. way, that I may comprehend the true meaning of these papers. I did not answer your other letter, as you were going out of town; indeed, I did not think it required a reply, all things being settled. I have put the papers by till I hear from you; I may then have recovered my senses: I have been so light headed that I have been quite inconsistent in all things." "N. B. I had a line from Mr. Johnson to know if I chose to proceed at law, and I declined as you desired me.^(a) I hope you and family are well. What can be your reason not to see me and settle, if there is occasion for any settlement?"

[*43] *The defendant to Mrs. Andree, dated 4th September, 1830. "I beg to thank you for your request to see me, and which I shall avail myself of, when I return to town and our present matter of business is disposed of; but upon that or any other pecuniary occasion of business you must excuse me for having determined not to have any personal communication with any relative in future. I have found from experience that the only satisfactory way is to have such matters arranged through the interposition of third persons. *You owe it to yourself to have Mr. Grojan or some other professional man to look at the account and see that you are fairly dealt by*, and there can be little difficulty in your requesting Mr. Grojan's attention to it for you, and let him see Mr. Johnson on the subject. *I must beg that you will place no confidence in me on this occasion, but be governed by Mr. Grojan, your own legal adviser.*

Mrs. Andree to defendant, dated 14th September, 1830. "Mr. Grojan comes to town on Monday, I will then send the papers to him: I have read them with wonder and astonishment. Mr. Bell's opinion concerning the Strand estate must, I think, be wrong—he can not have seen Mr. Andree's will. It is, in my opinion, a vague and inconsistent sort of business, varying from all equity on my side—quite a new system of law, to alter and make void a testator's will: I should think if one part is to be altered, the whole would be affected. I am eighty-seven next November, and therefore cannot last long; then all is yours—you can sell and act agreeably to yourself."

The defendant to Mrs. Andree, dated 17th of September, 1830. "I am glad to find from your letter that you understand the papers: what is right to be done shall be done, with that be content. The time is arrived [*44] at *which the matter may be properly arranged, and without inconve-

(a) This referred to a claim for interest upon the arrears of the annuity, on which point the defendant had addressed a letter, dated the 10th of August, requesting her to decide whether she would prosecute it.

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nience to you: be thankful that I have not before required it. Mr. Bell and the accountant I think ought to have allowed me interest upon the sums I have yearly advanced to you for twenty-nine years by paying you the Strand rent; this, if calculated, would amount to upwards of 500*l.*, and instead of anything being now payable to you, you would owe me a balance; this would be only reasonable, as my payments have contributed to your savings."

The defendant to Mrs. Andree, without date. "The matter rests with yourself. When I learn from you that you fully understand the account, through your solicitor, and are satisfied with it, it will be settled. I had hoped that this would have been done before. I now leave town and shall not return for some days. As the account has been sent to you I feel myself pledged to it, but had it been properly considered as to the interest, not one shilling would be due to you, but a balance due to me from you. The balance of the account is 488*l.* 10*s.* 6*d.*"

It appeared from the evidence of Mr. Johnson, who was examined as a witness on the part of the defendant, that Mr. Grojan, acting as the solicitor of Mrs. Andree, had three interviews with him on the subject of the account, on the 24th and 27th of September, and the 8th of October, 1830. On the first occasion he attended with the opinion of Mr. Bell and the account, "and discussed the opinion and the account; and after such discussion Mr. Grojan expressed himself satisfied with the account, and said he thought it fair, and calculated upon a liberal principle and said he would see Mrs. Andree and explain the account to her." That on the 27th of October, 1830, Mr. Grojan called on Mr. Johnson and stated, "that Mrs. Andree was [*45] satisfied with the account and was willing to receive the balance of 488*l.* 10*s.* 6*d.* appearing due to her on the said account, and requesting to be informed what receipt would be required; and on the 8th of October, 1830, he brought the account, at the foot of which was the following memorandum, signed by Mrs. Andree and attested by Mr. Grojan. It was afterwards signed by the defendant.

"7th of October, 1830. We do hereby declare that this account is approved of by us, and that the same, as to the matters therein referred to, contains our agreement in respect thereof, and which we do hereby confirm.

"*M. Andree.*

"*E. R. Pickering.*"

Mrs. Andree also gave to the defendant a receipt for the 488*l.* 10*s.* 6*d.* which was annexed to the account, "in full for all her claims and demands for or on account of the several sums, matters and things therein stated, mentioned or referred to, save and except as to the rent of the house in the Strand therein mentioned, and which she was to receive as theretofore;" this was also attested by Mr. Grojan, "as solicitor for the said Mary Andree."

Mrs. Andree died in July, 1836, and this bill was filed by her executor, praying a declaration, that the account settled and signed on the 7th of Oc-

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tober, 1830, was not binding ; for a declaration, that Mrs. Andree was entitled for life to the rents of the leasehold, and to the whole arrears of the annuity which accrued during her life, with an alternative prayer, that the plaintiff might be at liberty to surcharge and falsify the account, and for consequential directions.

[*46] *Mr. Grojan being abroad, was not examined as a witness.

Mr. *Pemberton* and Mr. *S. Sharpe*, for the plaintiff.

Mr. *Kindersley*, and Mr. *G. Richards* and *M. Lloyd*, for the defendant.

Howe v. Lord Dartmouth,(a) *Allcock v. Soper*,(b) *Collins v. Collins*,(c) *Bethune v. Kennedy*,(d) *Cory v. Cory*,(e) *Clifton v. Cockburn*,(g) *Mousley v. Carr*,(h) *Mills v. Mills*,(i) *Vincent v. Newcombe*,(k) were cited ; and see *Money v. Gibbs*.(l)

THE MASTER OF THE ROLLS :—This case, in principle, is one of very great importance, and considering the relation of the parties, is in many respects of a very painful nature.

If I thought it probable, that I could come to a conclusion at all differing from that to which I have arrived, after having attended with every care to the arguments during the discussion, I should certainly take time for further consideration, but having formed an opinion which appears to me satisfactory, I ought not to delay declaring it.

The first question in this case is. whether the parties are bound by an account and an alleged agreement, purporting to have been settled and made between them on the 7th of October, 1830 ; and if not, then this [*47] question *arises, upon what principle are the rights of the plaintiff, as representative of Mrs. Andree under the will of her second husband, to be decided ? On the other hand, if the account is held to be a settled account, it is then to be considered, whether there are not such specific errors apparent on the account itself, as to entitle the plaintiff to surcharge and falsify it.

[His Lordship, after having stated the will and death of the testator, the acquiescence of the executor in the widow's receiving the whole rent, the circumstances attending the recovery of the arrears of the annuity, and the letters of the 13th and 27th of February, 1830, continued.]

In the suit for the recovery of the arrears of the annuity, Mr. Johnson acted as solicitor for the plaintiffs, that is for Mrs. Andree, as well as for the defendant, E. R. Pickering, and this should certainly be borne in mind throughout the whole of this case.

Very soon after the date of the letter of the 27th of February, the defendant caused a case to be laid before Mr. Bell for his opinion : he therein stated that a question had arisen, whether Mrs. Andree (who, it must be observed,

(a) 7 Ves. 137.

(b) 2 Mylne & K. 699.

(c) Id. 703.

(d) 1 Mylne & Craig, 114.

(e) 1 Ves. sen. 19.

(g) 3 Mylne & K. 76.

(h) Id. 205.

(i) 7 Sim. 501.

(k) 1 Younge, 599.

(l) 1 Drury & W. 394.

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during the whole of this period had been receiving it, with his concurrence and assistance,) was entitled to the whole amount of the income of the testator's estate as it stood at his death. Instead of communicating this doubt to her or to Mr. Johnson, who was acting as solicitor for Mrs. Andree, as well as for him, he caused a case to be framed, or probably prepared it himself, and laid it before Mr. Bell for his opinion. That case did not, however, set forth the will, but it stated what was represented to be the substance and effect of the will, and it did not represent the "facts as they stood ; I think very slightly of the alteration of names, except for this, —that if the names had been truly stated and the will had been correctly set forth, it would then have appeared upon the case itself, that the remainder man was also the executor, whereas, in the mode the case was put, it appeared that the remainder man was a distinct person from the executor, and it was, therefore, quite impossible for Mr. Bell to form any notion that any question had arisen, or could arise, with respect to the conduct of the executor and remainder man towards the tenant for life.

The defendant now states, that this case was laid before Mr. Bell for his own guidance, and with regard to his own interest alone : I am under the necessity of saying that this statement appears to me to be inconsistent with the case, for the statements and questions which appear in the case necessarily lead to the conclusion, that it was submitted for the opinion of counsel on behalf of all parties interested. This case, then, did not represent the facts truly—it did not state, that during the whole period the tenant for life had been receiving these moneys with the consent of the remainder man and executor ; but it did state that claims had been set up, which had never been suggested to one at least of the parties : it set forth besides, a number of valuations, which, in one view, may be considered as valuations for the purpose of showing the practical case or practical point on which the questions arose, but in another might have a very different aspect, as being calculated to show that the parties whose interests were to be affected by that opinion perfectly understood their position, and knew the effect on their interests of that opinion if they should think fit to act upon it. The opinion was given on the 20th of March, and for any thing that appears to the contrary, the *defendant having in his possession that document, which was afterwards considered by him to be so important, as determining the rights between himself and his mother, kept it entirely to himself from the 20th of March, to the 3d of August ; so that during the whole of that period he had the opportunity of considering what was the most advantageous mode of using that opinion for his own interest ; but instead of giving Mrs. Andree the opportunity of considering it before the money became payable, he kept her in perfect ignorance of it, till about the time when the money was to be paid, and then he says,—“ Agree to this, or wait until such time as the point raised between us can be decided.” Considering that no question whatever had then been raised between the parties, either on the construction of the

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will, or on her rights as tenant for life under it,—considering that the suits had been prosecuted in their joint names for the recovery of a sum in which they had each an interest,—that at the end of the suit it was necessary that they should come to an account for the purpose of dividing that sum between them, for in any view of the case each had some interest,—considering that Mr. Pickering had raised a most important question affecting her right to the whole income which, with his assistance, she had been in the habit of receiving for twenty-nine years—nothing seems to me more extraordinary, under such circumstances, than the conduct pursued by the defendant on the occasion.

Having obtained the opinion of Mr. Bell he employed an accountant, not confining him to that opinion but proposing an important addition to the mere matter of account; what appears from the account is this: he says the widow has received the whole rent of the leasehold which, according to the [*50] opinion, was more by 23*l.* 3*s.* 6*d.* a year than she was entitled to; this in the total amounted to 683*l.* 13*s.* 3*d.* On the other hand he says to the widow, you are entitled to an annuity of a certain amount, I am the accountant, I will compute it for you, and I find there is coming to you, in that respect, 960*l.*, and deducting the 683*l.* 13*s.* 3*d.*, 276*l.* 6*s.* 9*d.* appears due to you; but then he says, you will not for the future be entitled to the whole rent of 103*l.*, but to 79*l.* 16*s.* 6*d.* only, and as I compute, you will be entitled to the interest of the surplus residue, amounting to 108*l.* 1*s.* per annum, and to 276*l.* 6*s.* 9*d.* cash. That would have been the account made out according to the opinion of Mr. Bell. Instead of sending such an account or anything like it, the defendant makes this sort of arrangement:—he proposes that she shall purchase the 23*l.* 3*s.* 6*d.*, which was the overplus of the rent of the leasehold beyond what she was entitled to receive, and that she shall sell the 108*l.* 1*s.*, to which she was entitled for life, and he reckons this at two and a half years' purchase, and by that calculation 212*l.* 3*s.* 9*d.*, more becomes due to her, which, added to the sum of 276*l.* 6*s.* 9*d.* in cash she was entitled to receive, makes up the 489*l.* 10*s.* 6*d.* He was therefore proposing, not a mere settlement of the account, but a settlement of the amount conjoined with an agreement for the sale and purchase of annual sums in a complicated mode; this could not be effected without a positive and clear agreement, between these parties for the purpose. This was the situation of things and what he was proposing to do, when he writes this letter:—[His Lordship read the letter of the 3d of August, 1830, and proceeded.] Not the smallest allusion to there being any doubt whatever as to the correctness of the opinion which Mr. Bell had formed on the subject,—not the smallest allusion to the effect that might have been produced by his acquiescence, or rather by his active participation in the payments which had so many years been made to this lady, but assuming as clear that the opinion was correct—assuming and clearly representing that the account was framed in conformity with the opinion which had been given.

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Mrs. Andree received this account on the 3d of August, the Master's report was made on the 4th of August, and was immediately confirmed; the case, I presume, was, as it was intended, set down as a short cause, and the decree was made on further directions on the 14th of August. [His Lordship here referred to the question of interest on the arrears of the annuity recoverable from Ward's estate, and a letter of the 10th of August, and to the expression in Mrs. Andree's letter of 31st of August, "I decline as you desired me," and proceeded.] From this it appears to me, that Mrs. Andree considered an intimation of the defendant's opinion as a desire, and acted upon it accordingly. The money amounting to 4047*l.* 5*s.* 8*d.* was received by the plaintiff on the 28th of August, and we approach the time when this agreement was made.

The first letter after this is from Mrs. Andree, and it is dated the 31st of August. [His Lordship read it and proceeded.]

It is to be recollected that this was an old lady of eighty-six who was writing to her son, the executor of the will of her deceased husband, and the person entitled in remainder to the property which she was to enjoy for her life, and who was also the person on whom it is perfectly clear she relied, as being likely religiously to advise her for her benefit. The answer was dated the 4th of September. [His Lordship read it.]

"This letter has been relied on, and under the circumstances of the [*52] case, must necessarily be relied on as showing, that the defendant intended that his mother should act entirely independent of him,—that she should have a legal adviser competent to protect her, and that under the circumstances of this case it amounted to this,—that he was acting as a solicitor quite adversely, and that she had a solicitor of her own quite adverse—that the two parties had an equal degree of knowledge on the subject, and were acting fairly in all respects, each for their respective interests—and that under such circumstances, the agreement, whatever it was, must be binding between them.

I must say I do not think that this is the real state of the circumstances in this case. Mrs. Andree was disposed to rely and did rely on the defendant, and it is not enough in such a case for him to say, "Don't trust me, go to Mr. Grojan or somebody else, who will advise you:" he could not in that way, divest himself of the duties of the situation in which he stood with regard to her, at the time of this transaction,—he could not divest her mind of the feeling of confidence she entertained, or of the natural influence which from his situation he must have had over her. It appears that she complained and felt hurt and surprised at his not coming to her "and settle, if there was occasion for any settlement;" she did not imagine and could not expect that he would wrong her, but believed he would act perfectly right. It is not an answer to this to say, "I shall take to myself the solicitor in whom you have confidence, of whom you have a high opinion, and you may go to Mr. Grojan, or some other solicitor who will advise you." Mr. Grojan,

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whom she had known from his infancy, was probably the person to whom she would resort; and it is also very possible, that she did not [*53] know another person in the world to whom she could go, except the defendant her son, Mr. Grojan and Mr. Johnson. The defendant thought fit to refuse to communicate with her except in this way,—the services of Mr. Johnson he assumed to himself, and Mr. Grojan was then the only person left to her.

After this Mrs. Andree seems to have looked into these papers, and then comes the letter on which the defendant in this case places his principal reliance. [His Lordship read the letter of the 14th of September, 1830, and proceeded.] What does appear from the letter is this: "I cannot have this matter settled without Mr. Grojan or somebody else: when Mr. Grojan comes to town I will send him the papers. But this is the most astonishing thing that ever was: from the year 1801, when my husband died, till now, the year 1830, with your entire concurrence and with your assistance, both of us knowing perfectly well the will of the testator, I have been in the full receipt of this income, and now Mr. Bell tells me, in his opinion, I have received more than I ought, and I am called upon to refund: surely this must be wrong." It is assumed that because she says this, that she was therefore in a condition to have the matter newly investigated—newly inquired into, and to have the account taken on a different principle. It must be observed, that this letter does not in any way suggest that any thing more than the account had been proposed to her, but she is astonished that she should be held not entitled to that, which for twenty-nine years she had been in the constant receipt of. What answer does the defendant make to that letter? "Madam, I am glad to find from your letter that you understand the papers, &c." I am under the necessity of stating, the letter does not in any way show that she understood them. How [*54] does it appear that she understood what was proposed respecting the sale and purchase of the income? she understood, it is true, that Mr. Bell had stated she was not entitled to that which she had received; but no inference whatever arises that she understood the papers.

The effect of the defendant's answer is this:—"Be thankful for that which I offer you, for if justice were done, not only would you have nothing, but you would be my debtor?" and this communication, be it recollected, comes from the executor—from her son—from the person who up to this time had been directing the operations of the solicitor, if not acting as the solicitor himself—from the person in whom she expresses the confidence which she had done in her previous letter.

I am not surprised that after this letter of the 17th of September, the matter was so easily settled between Mr. Grojan and Mr. Johnson—it was on the 24th that the first communication took place between them. There is nothing to show that the matters which were principally to be discussed between these parties ever were, in any way, called to the attention either of this lady

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or of Mr. Grojan, who was acting as her solicitor, but the matter, as far as I can judge of it from the evidence, was treated as a question of account, to be settled in conformity with the opinion given by Mr. Bell. It was most important that the opinion, (seeing that it had been given on a case not stating the words of the will, though it was most important that the words themselves of the will should be set forth verbatim,) should have been submitted to the consideration of some other competent person, who might have the opportunity of considering the whole will; but it was assumed in this *proceeding, that the opinion had been correctly formed, that no [*55] weight was to be attached to the acquiescence of the executor for twenty-nine years, that the valuations stated in the account were all of them correct. There is not the least evidence to show that in the intervening time Mr. Grojan had laid a case before counsel for his advice on behalf of Mrs. Andree, and though I am told at the bar that I must assume he did, there is not the slightest circumstance which can give a color to any such conclusion.

In the course of the discussion which took place between Mr. Grojan and Mr. Johnson, Mr. Grojan expressed himself satisfied,—he said the account was not only an account in conformity with the opinion, but was liberally framed in conformity with the opinion; on a subsequent occasion Mr. Grojan calls, and says he has communicated with Mrs. Andree, who is equally satisfied; he then obtains the signature of Mrs. Andree to a memorandum of the agreement, which is in these words: “We do hereby declare that this account is approved of by us, and that the same, as to the matters therein referred to, contains our agreement in respect thereof, and which we do hereby confirm.” These words, beyond all doubt, are large enough to cover all that is demanded, and if this agreement had been fairly entered into,—if the matters in question had been really brought to the notice of Mr. Grojan, and had been presented to him in a form, in which ordinary attention to business would enable him to discover what were the points arising between the parties, I should then have said, it would* be extremely difficult indeed to set aside this account; but I am of opinion that this transaction was so managed, that it was not in the power of any person transacting business in the ordinary manner to *come to the real truth, and to observe the effect [*56] of the account here rendered. I do not find that the least intimation was given of the most material part of the account, namely, the purchase and the sale of the income, and certainly I do not find that the most material circumstance affecting the interest of Mrs. Andree was brought forward.

When parties, whose rights are questionable, have equal knowledge of facts and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective claims among themselves, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time; and that notwithstanding the subsequent discovery of some common error; and if in this case the parties had been on equal terms,

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the agreement might have been supported. But the parties were not on equal terms; and moreover, I am of opinion that under the circumstances, it was the duty of the defendant to see that the nature of the transaction was fully explained to his mother, and to see that she was placed in a situation to have the question properly considered on her behalf; and whatever may have been his intention in this respect, (for I do not think it necessary to impute to him an intentional fraud throughout the transaction,) I am of opinion that he did not perform this duty—and on the whole it appears to me that he is not entitled to the benefit of the settled account, and that the agreement must be set aside.[1]

The next question which arises in this case is, as to the construction of the will, and what were the rights of Mrs. Andree under it. Questions of this nature cannot be perfectly clear, but the court endeavors on all occasions of this kind to ascertain from the whole will the *intention of the testator, and when that is ascertained, it becomes the duty of the court to carry it into effect. No doubt the general rule is this:—that if the residue of an estate be given to one for life, with remainder to another, then it being clearly the intention of the testator that the person in remainder shall have something, the court, in order to arrange the rights of the two parties, adopts the rule so often referred to and not disputed; but if the court finds in the will sufficient to show an intention of the testator, that the legatee for life should enjoy the property in the state in which it stood at the time of the testator's death, then that intention must be carried into effect.[2]

There is an obscurity which frequently arises in these cases, from the use that is made of the term "specific legacy:" when the word "specific" is used on such an occasion as this, I do not think it is used in the ordinary sense in which "specific" is applied to a legacy,—it is used to this extent only, that the property is to be specifically enjoyed. That is the meaning of the term, and is the view taken by Sir John Leach, and which has been since acted on by the Lord Chancellor. The question on this will, therefore, is, whether the testator giving the property absolutely to his widow for life, did intend her to enjoy it in the way he had it himself. [His Lordship stated the will.]

[1] As to this branch of the decision, see *Chappedelaine v. Dechenaux*, 4 Cranch, 306. *Freeland v. Heron*, 7 Cranch, 147. *Perkins v. Hart*, 11 Wheat. 237. *Barrow v. Rhineland*, 1 Johns. Ch. Rep. 550. *Farnam v. Brooks*, 9 Pick. 212. *Philips v. Belden*, 2 Edw. Ch. Rep. 1. 1 Story's Eq. § 523. *Lambert v. Hutchinson*, 1 Beav. 277, 286.

[2] Vide *Lichfield v. Baker*, post, 481. *Goodenough v. Tremamondo*, post, 512. *Benn v. Dixon*, 10 Sim. 638, and the Editor's notes to that case. In note 2, page 639, the Editor has omitted to give a reference to the case quoted at some length, at the commencement of the note. The case intended is *Lichfield v. Baker*. For the confusion in the last line of the said note, the Editor is in no wise responsible.—An express direction, by a testator, for the conversion and for investment of his personal property, from time to time, as trustees may think fit, will not necessarily prevent the operation of the general rule, that where personal property is given in a series of limitations, it shall be invested in such securities as are approved of by a court of equity for the benefit of parties interested in remainder after the death of the tenant for life. *Caldecott v. Caldecott*, 1 Ye. & Coll. C. C. 312.

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It is to be observed on this will, that there is a direct gift to her, for life, of all the particulars therein enumerated; it is made subject to payments some of which are annual payments, to annuities, and to insurances the particulars of which are not stated, except the one mentioned in the codicil; whatever they were, the annuities and insurances were to be paid by her, he giving to her, for her life, the rents, dividends, *annual produce and [*58] profits, and the use and enjoyment of all his estate, whether real or personal, for and during the term of her natural life, subject to the payments after mentioned. I have looked at this many times, and I think, on the whole, that it is a case in which the testator has given to her the use and enjoyment of the interest and rents and produce of his estate, as it stood at the time of his death; I have, therefore, come to a conclusion on this will contrary to that which was formed by Mr. Bell on the statement made by the defendant. This appears to me to be the proper construction of the will, and the account between these parties must, therefore, be taken on that footing.

Decree accordingly for the plaintiff with costs.

Affirmed by the Lord Chancellor, July 10th, 1839.[1]

BEAVAN v. WATERHOUSE.

1839: June 26.

A clerk in court, who acted both for the plaintiff and defendants, applied to the plaintiff's solicitor for the names of commissioners to take the defendants' answer: Held, that this must be considered as a step taken by him on behalf of the defendants, although it was sworn that no instructions had been given by the defendants to the clerk in court for preparing a commission, and that such application, if any, had been made by him in the character of clerk in court of the plaintiffs.

A defendant, after having appeared to an amended bill, obtained an order for the delivery out of court of his papers, to enable him to prepare his answer, and after the time for answering had expired, applied to the plaintiff for names of commissioners to join in taking his answer: Held, that he could not afterwards refer the bill for impertinence.

THIS was a motion on behalf of the plaintiff, to take off the file, on the ground of irregularity, certain exceptions for impertinence, which had been filed by the defendants to the amended bill.

"The defendants answered the original bill, and afterwards deposited. [*59] ed in court the documents admitted to be in their possession. On the 16th of April, 1839, the plaintiff, filed his amended bill, to which the defendants appeared on the following day; the time for demurring expired on

[1] Reported 4 Myl. & Cr. 289. At the conclusion of his judgment, (p. 304,) Lord Cottenham says; "There was, undoubtedly, some doubt upon the will; and if the case turned upon the construction of the will alone, I should think it a very fair case for appeal; but when I find that it did not turn upon this will only, but that the object of the appeal is also to establish the transaction between the son and his mother, I am bound to dismiss the appeal with costs."

1839.—*Beavan v. Waterhouse.*

the 28th of April, and on the 30th of May, the defendants obtained an order for the delivery out of court of the documents for the purpose of preparing their answer. The time for answering the amended bill expired on the 5th of June, and on the following day (the 6th of June,) the defendant's clerk in court, who also acted as the clerk in court for the plaintiff, sent a note to the plaintiff's solicitors, requesting the names of commissioners to be appointed on behalf of the plaintiff, to see the answer of the defendants to the amended bill taken. The plaintiff's solicitors replied on the 12th of June, that the plaintiff would not join in the commission, and on the same day wrote to the defendant's solicitor, stating they were anxious for the answer and requesting to be informed when it would be filed. No answer was returned; but on the 17th of June, the defendants filed exceptions to the plaintiff's amended bill for impertinence.

It was now moved on behalf of the plaintiff, that these exceptions should be taken off the file for irregularity.

An affidavit was made on behalf of the defendants, stating "that no instructions had ever been given to the clerk in court for the said defendants to prepare a commission to take their answer to the amended bill," and that "if any such note asking for commissioners' names had been given by the said clerk in court, as was stated, that such note had been given by the [*60] clerk in court in his character of plaintiff's clerk in court, and not of defendant's clerk in court."

Mr. *Pemberton* and Mr. *Beavan*, in support of the motion:—Where a party takes any steps in the cause, he cannot afterwards refer his opponent's previous pleadings for impertinence, though he may for scandal: thus, where the defendant has obtained an order for time to answer, *Ferrar v Ferrar*,^(a) or has submitted to answer, *Anonymous*,^(b) he cannot refer the bill for impertinence; a party cannot refer an affidavit for impertinence after he has filed a counter affidavit in opposition; *Re Burton*; ^(c) *Keeling v. Hoskins*.^(d) The order therefore procured by the defendants for the delivery out of court of the papers, prevents the reference for impertinence; secondly, the note calling for commissioners' names was a submission to answer, and had a similar effect; and thirdly, since, by the new general rules, orders for time to answer are rendered unnecessary, and the defendant must demur, if at all, within twelve days, he, by allowing that period to expire, submits to answer, and has therefore no longer the right to refer the bill for impertinence. The defendants ought to have taken the step earlier; it would be a great hardship on a plaintiff to be prevented enforcing an answer after expiration of the time for answering, by means of a reference of this description obtained, as of course, by a defendant who at the time is actually in default.

(a) 1 Dickens, 173.

(b) 2 Ves. sen. 630.

(c) 1 Russ. 380.

(d) 2 Russ. 319; [320, n 1;] and see *Beckford v. Skewes*, 8 Sim. 206; and *Jeffray v. McCube*, 1 Russ. & M 739.

1839.—*Beavan v. Waterhouse.*

Mr. Kindersley and Mr. Rogers, contra :—*Under the old practice, [*61] a party might demur at any time prior to obtaining an order for time, and until such an order was actually obtained he might refer for impertinence; the new orders do not limit the time, within which such exceptions are to be taken, and the old practice now prevails; the time for referring does not therefore expire with the time for demurring, but on an order for further time to answer being obtained by the defendants.

The application for the names of commissioners was a step taken by the clerk in court as representing the plaintiff, and cannot therefore be objected to as a step taken by the defendants so as to prevent their afterwards filing exceptions for impertinence.

The order for the delivery out of papers, was obtained before the pleadings had been laid before counsel and the alleged impertinence discovered, and it ought not to prevent the defendants filing exceptions, as there has been no delay. They cited *Nedby v. Nedby*, (a) where, after the time for demurring had expired, the defendant filed exceptions to the bill for impertinence, which were allowed, and seven days afterwards he demurred, the Vice-Chancellor held, that this was regular. They also cited *Anonymous*. (b)

THE MASTER OF THE ROLLS :—The question is, whether these exceptions ought or ought not to be taken off the file. The amended bill was filed on the 16th of April, and an appearance was entered to it on the next following day. Seven weeks are allowed by the general orders of the court for putting in an answer to an amended bill, and the time *ex- [*62] pired on the 5th of June. The defendants thought fit to employ, as clerk in court, the same person who was the clerk in court of the plaintiff, and on the 6th of June, this clerk in court writes a note to the solicitors of the plaintiff, to ask whether he would join in a commission to take the answer of the defendants. It is said, it was the clerk in court of the plaintiff who made this request, and that is to some extent true, but how came it into his mind to make this communication to the solicitors of the plaintiff? It must have been suggested to him in the course of his duty as clerk in court of the defendants. If parties think fit to employ persons in this way who have conflicting duties, they must take the consequences of it, and I must hold that the suggestion which was made by the clerk in court in one character, to himself in another, must have all the effect that is imputed to it by the plaintiff, and must be considered as made by the clerk in court of the defendants, and as a step taken on their behalf, with a view to get their answer sworn. The time for answering having expired, there being this intimation actually given, that the answer was about to be put in, and an order having also been obtained that papers might be taken out of the court to enable these defendants to prepare their answer, (which I do not consider immaterial,) I think it is made out very clearly, that there have been such pro-

(a) 8 Sim. 334.

(b) Mos. 71.

1839.—Rippon v. Norton.

ceedings as rendered it improper for them afterwards to file exceptions to the bill for impertinence ; I therefore think that this motion ought to be granted, with costs.[1]

[*63]

*RIPPON v. NORTON.

1839 : June 26.

Property was settled on J. R. by his father, until he should take the benefit of the insolvent debtors' act, and then the trustees were, during his life, to apply it in such manner and to such persons, for the board, lodging and subsistence of J. R. and his family, as the trustees should think proper ; and after his decease, upon trust for such persons as J. R. should appoint, and in default of appointment, in trust for his children. J. R. took the benefit of the insolvent debtors' act: He had three children, but his wife was dead. Held, that his children, who were all infants, became entitled to three-fourths and the assignees to one-fourth of the life interest of J. R.

DR. RIPPON being possessed of the copyright of printed and manuscript books and of certain copies thereof on hand, by deed dated in January, 1832, in consideration of the natural love and affection which he had for his son John Rippon, assigned the same to trustees, upon trust, during the natural life of Dr. Rippon, to permit and suffer him and his assigns to manage and conduct the printing, publishing and disposing of the said printed and manuscript books and publications and works and the copies thereof, as fully and effectually as if the assignment had not been made ; and also to have, hold, receive, take, possess and enjoy all the profit, benefit and advantage arisen and produced and to arise and be produced therefrom, and the copies thereof and any new editions of the same, for his own absolute use and benefit ; and after his decease, upon trust that the trustees, during the natural life of John Rippon the younger, should permit and suffer him to manage and conduct the printing, publishing and disposing of the said printed and manuscript books, publications and works and the copies thereof, and should permit and suffer John Rippon the younger to have, hold, receive, take and enjoy all the profit, benefit and advantage arisen and produced and to arise therefrom, for his and their own use and benefit during his natural life, in the mean time and until he should be declared a bankrupt, or seek relief under or take the benefit of any act made and then in force or thereafter to be made for the relief of insolvent debtors, or enter into and execute any deed of composition with his creditors, or bargain, sell, mortgage or otherwise dispose of, by way of anticipation, the profits or produce of all or any of the said printed and

[*64] manuscripts books, publications and works, or the copies thereof respectively, to any person or persons whomsoever ; and from and after the said John Rippon the younger should become bankrupt or insolvent, or execute any deed of composition, or should bargain, sell, mortgage or other-

[1] When right to except for impertinence is lost by taking further proceedings, see further *Holmes v. The Corporation of Arundel*, 3 Beav. 303.

1839.—*Rippon v. Norton.*

wise dispose of, by way of anticipation, the profits or produce of all or any of the said printed and manuscript books, publications, or the copies thereof respectively, then and in such case the said trustees or the survivor of them or the executors or administrators of such survivor should thenceforth, during the then remainder of his natural life, pay and apply such part of the profits and produce of the said printed and manuscript books, publications and works, copies and premises as would have been payable or have belonged to him during his life, in such manner and to such persons, *for the board, lodging and subsistence of himself and his family*, as the said trustees or trustee for the time being should think proper; and from and after his decease, then upon trust for such persons as J. Rippon the younger should appoint, and in default and until such appointment in trust for his children.

In the month of January, 1834, John Rippon the younger took the benefit of the insolvent debtors' act, and executed the usual assignment of his estate and effects to his assignees.

Dr. Rippon the settlor, died in 1836, and at his death he had in his possession a number of copies of the works, some of which had been printed before the execution of the deed and some afterwards.

The trustees named in the deed refused to act, and the deed contained no power of appointing new trustees.

This bill was filed by the three children of John Rippon the younger, who were all infants, praying the *establishment of the deed, and [*65] that the rights of the parties under it might be ascertained, and that new trustees of it might be appointed.

The wife of John Rippon the younger, and the mother of his children, was living at the institution of the suit, but died before the hearing.

The questions in the cause were, first, as to the interests taken by the plaintiffs and the assignees of John Rippon the younger in the settled property; and secondly, whether the copies of the works which had been printed after the date of the deed, in the lifetime of Dr. Rippon, were subject to the trusts.

Mr. *Tinney* and Mr. *Craig*, for the plaintiffs, the three infant children of John Rippon the younger, contended that they and the assignees of their father were entitled to the property in equal fourth shares, as tenants in common; and that, consequently, the assignees of John Rippon the younger were entitled to one-fourth of the profits, and the three children to the remainder.

Mr. *Pemberton* and Mr. *James Russell*, for John Rippon the younger.

Mr. *Loftus Wigram*, for the assignees of John Rippon the younger contended that it was clear that the deed was a mere shift and contrivance, to give John Rippon the younger such a life estate as would not pass to his assignees in case of his bankruptcy or insolvency; that it was therefore void, as being against the policy of the law, and a fraud on the insolvent and bankrupt acts; that the discretion intended to be vested in the trustees had ceased on the insolvency of John Rippon the younger; *Piercy v. Roberts*,^(a) *Snowdon v.*

(a) 1 Myl. & K. 4.

1839.—Cotton v. Cotton.

[*66] *Dales*, (a) that the *whole life interest passed to the assignees, who being empowered to execute the power of appointment vested in the insolvent, (b) were consequently entitled to the whole beneficial interest in the property.

Mr. *S. Sharpe*, for the executor of Dr. Rippon, contended that the deed affected that part of the stock only which was in existence at the time of its execution; and that the books printed after the date of the deed and in the lifetime of Dr. Rippon, were part of his personal estate.

Mr. *Tinney*, in reply.

THE MASTER OF THE ROLLS held that the effect of the deed was to declare a trust of a species of business, in which part of the property might be absolutely disposed of and new stock created in substitution; and that the books published after the date of the deed in the lifetime of Dr. Rippon, were therefore subject to the trusts of the deed.

His Lordship also held that the plaintiffs, the three children, were entitled to three-fourths, and the assignees to one-fourth, of the profits which might accrue during John Rippon's life. (c)[1]

[*67]

*COTTON v. COTTON.

1839: July 9.

Bequests to A. or his legal representatives. A. was dead at the date of the testator's will, having bequeathed his property on particular trusts: Held, that A.'s next of kin, according to the statute of distributions, were entitled to the fund.

JOSEPH COTTON, by his will dated in 1827, bequeathed his personal estate unto his wife, his two brothers and a Mr. Davis, upon trust to invest the same, and pay the dividends of one moiety to his wife for life or during widowhood, and subject thereto, to stand possessed of such moiety, and also the remaining moiety, upon trust for his children.

The testator died in 1828, leaving his widow and nine children surviving him; and his will was proved by his widow and his two brothers.

Subsequently, in 1834, John Lloyd made his will, by which, amongst

(a) 6 Sim 524.

(b) See 7 G. 4, c. 57, s. 22.

(c) *Abstract of the Decree*.—Establish the indenture, and "declare that the books printed by Dr. John Rippon between the date of the said indenture and the day of his death formed part of the trust property."

Refer it to the Master, to inquire of what the trust property consists, to take the accounts, to appoint new trustees of the indenture, and approve of a scheme for carrying the same into effect; and declare that one-fourth of the profits to be derived from the trust property during the life of the defendant John Rippon the younger, belongs to the defendants S. Warné and J. Coulthred, the assignees of the defendant John Rippon, and the remaining three-fourths to the plaintiffs.

[1] Vide *Page v. Way*, 3 Beav. 20. *Godden v. Crowhurst*, 10 Sim. 642. *Lord v. Bunn*, 2 Yo. & Coll. C. C. 98.

1839.—Cotton v. Cotton.

other things, he gave as follows: "I direct that all the rest of my property, by which I mean money in the funds or elsewhere, after payment of my debts and funeral expenses and such legacy duty as I may hereafter direct to be paid out of my estate, and after payment of the same, I intend to bequeath to my executors, be divided between the gentlemen hereafter named who were *supra* cargoes in the China service of the East India Company, or the legal representatives of the said gentlemen, in the proportion that the sums set against their names bear to each other." The testator then enumerated twelve persons, opposite to whose names he placed different figures, and amongst the names was placed that of the first testator, Joseph Cotton, in the following manner:—

"Joseph Cotton, Esq. 3402."

*The aggregate of the numbers so placed opposite to the names [*68] amounted to 18,350*l*. The testator afterwards proceeded as follows:

"Should any of the gentlemen before mentioned or their representatives decline to accept the bequest I have made to them, every bequest, acceptance of which may be declined, is to augment the proportions of the other parties, till they are, if possible, completely satisfied."

The testator, John Lloyd, died in December, 1837, and the sum ascertained to belong to Joseph Cotton, or his legal representatives, amounted to 2243*l*.

The widow of Joseph Cotton presented a petition, praying a declaration that the sum was subject to the before mentioned trusts of her husband's will, or that the rights of the parties therein might be ascertained.

The several points argued were as follows: first, whether the fund was subject to the trusts of Joseph Cotton's will; secondly, whether his executors took beneficially as his "legal representatives;" and thirdly, if the fund was divisible amongst the nearest of kin of Joseph Cotton, (thus excluding the widow,) or amongst his next of kin according to the statute of distributions.

Mr. *Pemberton*, for the widow.

Mr. *Kindersley*, for the children.

Mr. *Bickner*, for the husband of one the children.

Mr. *L. Wigram*, for the two other executors of Joseph Cotton.

*The following cases were cited:—*Bridge v. Abbot*,^(a) *Evans v. Charles*,^(b) *Long v. Blackall*,^(c) *Garrick v. Lord Camden*,^(d) *Price v. Strange*,^(e) *Baines v. Ottey*,^(g) *Palin v. Hills*,^(h) *Bulmer v. Jay*,⁽ⁱ⁾ *Robinson v. Smith*,^(k) *Styth v. Monro*,^(l) *Walter v. Makin*,^(m) *Gittings*

(a) 3 Bro. C. C. 224.

(d) 14 Ves. 372.

(h) Ibid. 470.

(k) 6 Simons, 47.

(b) 1 Anstruther, 128.

(e) 6 Mad. 159.

(i) 4 Simons, 48. S. C. 3 Myl. & K. 197.

(l) Ibid. 49.

(c) 3 Ves. 486.

(g) 1 Myl. & K. 465.

(j) 1 Myl. & K. 465.

(m) Ibid. 148.

1839.—Cotton v. Cotton.

v. *M'Dermott*, (a) *Elmesley v. Young*, (b) *Wallis v. Taylor*, (c) *Stocks v. Dodsley*, (d) *Hames v. Hames*. (e)

THE MASTER OF THE ROLLS :—This is a gift under the testator's will to a legatee or his legal representatives. The testator directs the residue to be divided between the gentlemen thereafter mentioned, or the legal representatives of those gentlemen, in the same proportions as the sums set against their names bear to each other. One sum is set against the name of Joseph Cotton, and this, therefore, is a gift to him or his legal representatives.

It is undoubtedly a matter of extreme difficulty to determine what a testator really means in cases like the present; but a construction has been put upon these words to which I am bound to adhere. In *Bridge v. Abbot*, *Long v. Blackall* and *Walter v. Makin*, it has been considered that legal representatives mean those persons who are by law entitled to claim beneficially the undisposed of residue, and who are, in this sense, the persons legally representing the individual to whom the gift was first made. The question is, who are these persons; it has been contended that they [*70] are either the executors *or the next or nearest of kin; on the other hand it is argued that they are those persons who would be entitled beneficially under the statute of distributions; and I am of that opinion. When it is said that the expression "legal representatives" means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons who, upon the construction of the will, are beneficially entitled in the place of the person to whom the gift was first made, and who, in that sense, legally represent such person. I must therefore refer to the statute of distributions, which points out those who are entitled to claim as the legal representatives in that particular sense of the words, and the authorities have determined that this fund belongs to those persons who are the next of kin, as designated by that statute.[1]

(a) 2 Myl. & K. 69.

(b) Ibid. 82.

(c) 8 Sim. 241.

(d) 1 Keen, 325.

(e) 2 Keen, 646.

[1] In *Saberton v. Skeels*, 1 Russ. & M. 567; S. C. Taml. 383, Leach, M. R., considered that the ordinary meaning of the words "*personal representatives*," was executors and administrators. But it does not necessarily follow that they would take a beneficial interest, nor but that the next of kin might claim through the intervention of the executor or administrator. See further as to the meaning of the word "*representatives*," 1 Russ. & M. 589, n. 2. *Graftey v. Humpage*, 1 Beav. 47, 52. On the subject of executors taking beneficially, see *Hames v. Hames*, 2 Keen, 646, 653, n. a.

1839.—Green v. Pulsford.

GREEN v. PULSFORD.

1839: June 27.

An estate was settled to the husband and wife successively for life, with remainder to their children as they should appoint, and in default of appointment between such children. The husband and wife encumbered their life interests, and in August the husband and wife, having seven children, appointed the whole estate to the eldest daughter; in October of the same year, the husband, wife and daughter mortgaged the property for 8000*l*. The mortgagee, under the power of sale in the mortgage deed, sold the property to the plaintiff; and after the title had been approved of, one of the younger children gave notice to the plaintiff not to complete, and that the appointment was a fraud on the marriage settlement, and also cautioning the purchaser not to pay the purchase money; he did not, however, follow up the notice by any proceeding: Held, that notwithstanding this, a good title was shown, and that the purchaser must complete.

On dismissal of bill an injunction falls of course.

By indentures of lease and release, dated in June, 1807, the freehold property which was the subject of the questions raised in this cause was conveyed to trustees, to the use of Francis G. C. Burridge for life, with remainder to the use of Mary Burridge his wife for "life; with re- [71] mainder "to the use of all and every, or such one or more exclusive of the other or others, of the children or child of the said Francis G. C. Burridge by the said Mary his wife," for such estates and interests as Francis G. C. Burridge and Mary his wife should during their joint lives by any deed appoint, and in default of appointment, to the use of all such children, as tenants in common in tail.

Francis G. C. Burridge had seven children by Mary his wife, namely, Elizabeth Mary, John and Julia, who had attained twenty-one, and Edward, George, Robert Arundel and Fanny, who were infants.

In 1816, Francis G. C. Burridge encumbered his life interest with an annuity of 346*l*., and in the same year Francis G. C. Burridge and wife mortgaged their life estates for securing 1000*l*. and further advances to the extent, in the whole, of 2000*l*.

By an indenture of the 16th of August, 1828, after reciting the settlement of June, 1807, and that Francis G. C. Burridge and Mary his wife had determined to appoint the property to the use of their daughter Elizabeth Mary Burridge, in fee simple, it was witnessed, that in consideration of natural love and affection, they appointed that the property should, immediately after the decease of the survivor of them, Francis G. C. Burridge and Mary his wife, go, remain and be to the use of Elizabeth Mary Burridge in fee.

By an indenture of the 21st of October, 1828, the then mortgagees, being paid, reconveyed the estate.

By indentures of the 30th and 31st of October, 1828, and by a fine levied, it was witnessed that in "consideration of 7000*l*. to Francis G. [72] C. Burridge and Mary his wife and Elizabeth Mary Burridge paid, they mortgaged the property to John Mabanke in fee, for securing that sum and interest.

1839.—Green v. Pulsford.

Francis G. C. Burridge died in June, 1830, and subsequently, by indentures of the 4th and 5th of August, 1831, the mortgage for 7000*l.* was transferred to Mr. Pulsford, who at the same time made to Mrs. and Miss Burridge a further advance of 3000*l.*, making in the whole 10,000*l.* By this deed Mr. Pulsford had a power of sale over the property in case of default being made in payment of the mortgage money.

In September, 1836, the defendant, Mr. Pulsford, put up the property for sale by auction, when the plaintiff became the purchaser of part for 4200*l.* The abstract was delivered, the title approved of and the conveyance prepared; but on the 24th of April, 1837, before the final completion of the contract, the plaintiff and the defendant's solicitor received from Robert Arundel Burridge, one of the children of Mr. and Mrs. Burridge, a letter in the following terms: "Sir, I have been advised by a friend, that the title to the property at Horsmonden, Brenchley, or Bockingfold in Kent, which you purchased at the auction mart in October, is invalid, in consequence of the appointment by Mr. and Mrs. Burridge to their eldest daughter, and the immediate conveyance by them to a mortgagee, being a fraud on the marriage settlement under which I claim; I beg, therefore, to give you notice on behalf of myself and brothers and sisters, that we shall hold you responsible for the property which you have purchased, and we caution you not to pay the purchase money, if it is not already paid. I remain, one of the sons of the aforesaid Mr. and Mrs. Burridge, your obedient servant Robert A. Burridge."

{*73} "The defendant's solicitor gave notice to Robert A. Burridge that he would complete, and would hold the notice given by him abandoned, unless he took proceedings within a month to enforce his alleged rights: but he returned for answer, that he was not bound to take any proceedings until the death of his mother. He took no proceedings.

The plaintiff, the purchaser, in consequence of the notice, refused to complete his purchase; and the defendant thereupon commenced an action at law for the recovery of the remainder of the purchase money. The plaintiff then filed this bill, praying that the defendant might be decreed to show a good title; and that, if it should appear that the defendant could not make a good title, by reason of the claim of the children of Mr. and Mrs. Burridge, or from the invalidity of the appointment, then that the plaintiff might be relieved from the contract and have his deposit repaid.

Pending the proceedings in this court the vendor recovered at law, but was prevented taking out execution by the common injunction.

Mr. *Pemberton*, and Mr. *L. Lowndes*, for the plaintiff, contended that from the circumstances, there were reasonable grounds for suspecting, that the exclusive appointment which had been made to the eldest daughter in exclusion of the other children, had been made for the benefit of the parent, and was a fraud on the settlement; that these circumstances of suspicion, and the note received from one of the objects of the power of his intention

1839.—*Green v. Pulsford.*

to contest the appointment, rendered the title so doubtful, that it could not be forced upon a purchaser: they observed that the plaintiff was a willing purchaser, and would be content to take the title if the court should be of opinion that it was valid.

*Mr. *Tinney* and Mr. *Walker*, contra, contended that the plain- [*74] tiff, claiming under a purchaser for valuable consideration without notice of any fraud, could protect himself by means of his legal estate against any future claims of the younger children; they relied on *M^{rs} Queen v. Farquhar*(a) as showing that such circumstances of suspicion were not sufficient to relieve the purchaser from his obligation to perform his contract.

That the questions had been decided by the verdict at law, on which occasion the plaintiff might have raised even equitable objections to the title.

Mr. *Pemberton* in reply.

THE MASTER OF THE ROLLS :—In all cases of this description it is extremely inconvenient to be compelled to decide in the absence of parties whose claims may hereafter arise; but such cases occasionally occur, as in *Du Hourmelin v. Sheldon*,(b) in which case it was necessary to decide a question as to the rights of the Crown in a suit to which the Attorney General was not a party. [His Lordship stated the circumstances of the case and proceeded.] This was the title under which Mr. Pulsford sold. The circumstances I have mentioned were fully stated in the abstract, and the title appears to have been approved of; and it could not, as I think, be otherwise than approved of after the judgment of Lord Eldon in *M^{rs} Queen v. Farquhar*. All this being done, but the purchase money being unpaid and the conveyance not having been delivered over, a notice was given by one of the younger children of Mr. and Mrs. Burridge, that the appointment made in August, 1828, was in fraud of the 'settlement. There was [*75] not, as I collect, one single fact stated, but a mere bare allegation was made, that the appointment was in fraud of the settlement; there was no more than the statement of that possibility which every body, upon looking at the transaction, must be aware might have existed. No doubt such a notice as this must have been very alarming to a party about to pay his purchase money, and would necessarily lead to all the inquiries which could be made upon the occasion; but the question is, whether the mere circumstance of this notice having been given, without one single fact being brought forward in any way to impeach these deeds, ought to be a reason why the contract should not be specifically performed.

There is nothing to show that Mr. Mabanke or Mr. Pulsford had not a good title, but the simple allegation of this party, that what was done was a fraud upon the settlement. I cannot say that I think this, of itself, is a reason why the state of things which existed immediately before that notice should be considered so far altered as to entitle the plaintiff to say that the

(a) 11 Ves. 467.

(b) 1 Bevan, 79.

 1839.—*Casborne v. Barsham*.

title is not a good title, or that the agreement ought not to be specifically performed. If it were possible to institute any inquiry as to the facts, which took place, I think it ought to be done for the satisfaction of the purchaser; and, in a case like this, I am persuaded that the vendor would equally desire to have it done; but I do not see how that can be. I think the title must be considered as a good title, and the bill must be dismissed with costs.

Mr. *Tinney* asked that the injunction might be dissolved.

THE MASTER OF THE ROLLS:—That is not necessary; the bill being dismissed, the injunction will go of course.[1]

[*76]

*CASBORNE v. BARSHAM.

1839; June 22, 26.

Signification of the term "*undue influence*" as applied to transactions between solicitor and client. There are transactions in which there is so great an equality between the transacting parties,—so much of habitual exercise of power on the one side, and habitual submission on the other, that without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence.

When undue influence is to be inferred from the nature of the transaction, or when the transaction is contrary to the policy of law, it is the province of the court to determine the point; and the question ought not to be sent to a jury.

THIS was a motion for a new trial under the following circumstances:—An issue had been directed, to try whether an indenture dated the 20th day of August, 1832, had been obtained from Dennis Chandler by the defendant Barsham *by fraud or undue influence*, as his solicitor.

The jury found, in effect, that the deed was not obtained by fraud, but was obtained by Barsham by undue influence, as the solicitor of Chandler.

The defendant Barsham now moved for a new trial, on the ground that the verdict, so far as it found that the deed had been obtained by undue influence, was against the evidence adduced at the trial.

The issue had been directed in a cause in which Mr. Casborne, as assignee of Dennis Chandler an insolvent, was plaintiff, and Barsham, together with two persons named Robinson and Matthew, were defendants.

The bill prayed that the deed might be delivered up to be cancelled, or that it might be allowed to stand only as a security for what, if anything, was justly due from Chandler to Barsham; and it alleged, that Chandler, being wholly under the influence and control of Barsham his solicitor,

[1] But in *Ferrand v. Hamer*, 4 Myl. & Cr. 147, Lord Cottenham said: "A plea allowed, a dismissal of the bill, an abatement of the suit do not dissolve an injunction, but an order for that purpose must be obtained;" and see 9 Sim. 410, n. 1. The general opinion, however, seems to accord with the view taken by the Master of the Rolls in the case *supra*. *Blennerhasset v. Scanlan*, 1 Hog. 363; 1 Barb. Ch. Pract. 644, and cases there cited.

 1839.—*Casborne v. Barsham.*

was fraudulently induced to execute "the deed whilst wholly [*77] ignorant of the effect of executing it, and without any consideration having been given for executing the same, and for the purpose of giving to Barsham a fraudulent preference over Casborne.

Barsham admitted that he was Chandler's solicitor, and that Chandler was, to such extent as a client is generally, under the influence of his attorney and solicitor, but no further or otherwise; but he denied that Chandler was ignorant of the effect of executing the deed, or that it was executed without consideration, or for the purpose of giving a fraudulent preference, or that the deed was obtained by fraud or undue influence.

Witnesses being examined, Dennis Chandler himself stated that he put his whole trust and confidence in Barsham, but that Barsham had no particular influence or control over him; and three witnesses, Frederick Wing, Dennis Chandler the younger, and Robert Chandler, stated that Barsham had great professional influence and control over Dennis Chandler. Witnesses were also examined as to the circumstances which took place before and at the time when the deed was executed, but the result not being satisfactory, the issue was directed.

Mr. Biggs Andrews, Mr. C. P. Cooper, and Mr. Elderton for the motion.

Mr. Pemberton, Mr. G. Richards and Mr. Gunning, contra.

June 26.—THE MASTER OF THE ROLLS:—The object of the first part of the issue was to ascertain whether Barsham had obtained the deed by fraud, by any suggestion of falsehood, or suppression of truth by misrepresentation or concealment of fact.

"The object of the second part of the issue was to ascertain [*78] whether Barsham, availing himself of his character of solicitor, had obtained the deed by undue influence, and some discussion took place as to the sense in which the words "undue influence" had been understood.

Omitting such transactions as are void by the policy of the law, it is plain that there are transactions in which there is so great an inequality between the transacting parties,—so much of habitual exercise of power on the one side, and habitual submission on the other, that without any proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence. Such cases have not unfrequently occurred in transactions between parent and child, and sometimes in transactions between persons standing to each other in the relation of solicitor and client.

But other cases do not rest solely on the nature of the transaction and the fact of habitual or occasional influence; it is required to show that some advantage was taken, or that there was some fear, some use of threat or of undue practice or persuasion.

When undue influence is to be inferred from the nature of the transaction, or when the transaction itself is contrary to the policy of the law, I appre-

1839.—*Casborne v. Barsham.*

hend that it is the province of the court to determine the point, and that the question ought not to be sent to a jury.[1]

And having regard to this bill and the particular charges which it contains, I am of opinion that the question to be tried upon this part of the issue was, whether Barsham acting as solicitor, availed himself of his influence [79] in that character to use improper *inducements to Chandler, whereby to prevail upon him to execute the deed.

The jury negatived the fraud, and their finding in that respect is not disputed, so that I must on this occasion conclude that there was no deception and no misrepresentation or suppression of truth; but the jury have affirmed the undue influence, and the question is, whether that finding is supported by sufficient evidence.

It appears that Mr. Casborne sued Chandler for tithes in the Court of Exchequer, Barsham conducted the defence of Chandler as his solicitor, and on the 2d of July, 1828, there was a decree against Chandler. The question, whether he was to pay costs to the plaintiff, being at that time reserved, it was obvious that he would at least have his own costs to pay, and on account of those costs he was indebted in a large but then untaxed and unascertained sum of money to Barsham; and some time after the date of the decree, but when first does not precisely appear, Barsham proposed to Chandler to execute the deed in question. The nature and provisions of this deed are open to very considerable observation, and it is clear that the deed was executed on the suggestion and under the advice of Barsham, and also clear that when it was proposed to Chandler he objected to it, and that the preparation of the deed was for some time delayed. The proposal was communicated to the family of Chandler; his son Robert knew of it ten days or a fortnight before it was executed, and objected that if there were an assignment it should be for the equal benefit of all the creditors. He afterwards, two days before the deed was executed, went to the office of Barsham with Robinson, one [80] of the trustees named by Chandler, the deed was read to him, *and he understood that it gave a preference to Barsham, and advised his father not to execute it; he says indeed that he did all he could to prevent his father signing the deed. He says also that his brother objected, and his father did not know what to do; he thought, however, that after the family had objected to it his father would not execute it.

Hannah Chandler, the daughter, was at her father's house on the Friday before the Monday on which the deed was executed, Barsham was there, and, as she says, promised Chandler 50*l.* and a farm if he would sign the

[1] When an issue will or will not be directed, see *Gardner v. Rowe*, 5 Russ. 258, 263, n. 1. *Piers v. Tuite*, 1 Dru. & Walsh, 279. *Jewett v. Palmer*, 7 Johns. Ch. Rep. 68. *Clapper v. House*, 6 Paige, 149. *Hudson &c. Canal Company v. New York &c. Rail Road Company*, 9 Paige, 332. *Flagg v. Mann*, 2 Sumn. 526. *Dexter v. The Providence Aqueduct Company*, 1 Story's Rep. 387. 2 Story's Eq. § 1447. *Milner v. Singleton*, 2 Yo. & Coll. C. C. n. (d) *Whitaker v. Newman*, 2 Hare, 299. *Frank v. Mainwaring*, post, 115.

1839.—Bennett v. Hayter.

deed, and on that Friday and the following Saturday, Matthew, one of the trustees, made a valuation of the farming stock and of the household effects to be assigned. On the morning of the 20th of August, Sams, the partner, went with the deed to Chandler, who at that time declined to sign it, saying he wished to speak to his sons again before he signed; it was read over to him in the presence of Hannah, who seems to have perfectly understood that it gave a preference to Barsham, and Chandler signed it in the afternoon of that day. What were the motives which induced Chandler himself to sign the deed do not appear. It is plain that the two sons and the daughter objected to and opposed its execution, and it seems singular that they should not have stated what were the motives which Barsham offered, to induce the father to execute the deed against their objections. The evidence affords no indication of any exercise of power or control by Barsham over Chandler, or of any threat used by him, or of any persuasion, except such as may be inferred by the offer of 50*l.* and a farm, which offer would rather tend to show, that any influence which Barsham attempted to exercise as solicitor was insufficient. Chandler had the opportunity of consulting his sons, who appear to have *been capable of advising him and to have advised [*81] him, and whatever were the inducements offered by Barsham, they had not succeeded, even on the occasion of the last interview which Barsham had with Chandler on the subject, for on the last day, when Sams attended for the execution of the deed, and, as he says, used no persuasions whatever, he found Chandler undetermined and desiring to speak with his son again before he signed, and the opportunity was given him to do so. On the whole, therefore, though the deed is of such a nature that I do not think Chandler ought to have been advised to execute it, and although the offers said to have been made to Chandler do in my mind throw some suspicion on the transaction, I do not find evidence of facts which appear to me to prove that the deed was obtained by the undue influence of Barsham, as a solicitor, and I think that the defendant is entitled to a new trial of that part of the issue.[1]

BENNETT v. HAYTER.

1839: July 15.

A testator bequeathed 1000*l.* to "the Jews' poor, Mile End;" there were two charitable institutions for poor Jews at Mile End, and it not appearing which of the charities was meant, Held, that the fund ought to be applied *cy pres*; and the court divided the bequest between these two charitable institutions.

THE testator Benjamin Hawes bequeathed as follows: "I leave, after the death of Lucy Hawes, as many thousand three and a half per cents to the

[1] As to granting new trial of an issue, see *Locke v. Colman*, 2 Myl. & Cr. 42, 635, 639, n. 1, and cases there cited. 2 Story's Eq. § 1447,

1839.—*Bennett v. Hayter.*

following charities, viz. 1000*l.* three and a half per cents to the Jews' poor, Mile End; secondly, 1000*l.* ditto to the Society for Relief of Prisoners for Small Debts; thirdly, 1000*l.* ditto to the Missionary," and after making fifteen other charitable gifts, he proceeded:—"nineteenth, 1000*l.* to Methodist [*82] preachers; twentieth, twenty-first, twenty-second, to the preachers "in the Presbyterian, Baptist and Independent persuasion, 1000*l.* to each; twenty-third, 1000*l.* to the Roman Catholic persuasion; twenty-fourth, 1000*l.* to Quakers' preachers."

By decree, made in May, 1836, it was referred to the Master to inquire what charities were meant by the testator by the descriptions of "the Jews' poor Mile End," "the preachers in the Presbyterian, Baptist and Independent persuasion" and "Quakers' preachers."

The legacy to the Jews' poor, Mile End, was claimed both by the treasurer and wardens of an hospital called "Beth Holim," in Mile End Old Town, founded in the year 1747 by the members of the congregation of Spanish and Portuguese Jews, for the sustenance and relief of the poor and destitute Jews of that congregation; it was also claimed by the trustees of another hospital called the Jews' Hospital, Mile End, for the support of aged poor and for the education and employment of youth, which had been established in 1795, for the relief of the class called German Jews and for the education of the youth of the same persuasion. These claims were supported by affidavits.

The Master found, that no sufficient evidence had been produced before him as to what charity was meant by the testator, by the description of "the Jews' poor, Mile End."

Both these charities filed exceptions to the Master's report.

Mr. *Richards* and Mr. *Stinton* claimed the legacy for the former charity; and,

[*83] *Mr. *Spence* and Mr. *F. H. Goldsmid*, for the latter charity.

Mr. *S. Sharpe*, for the plaintiff.

Mr. *Wray*, for the Attorney General.

Powell v. The Attorney General, (a) *Waller v. Childs*, (b) *Moggeridge v. Thackwell*, (c) *Attorney General v. Clark*, (d) *Simon v. Barber*, (e) were cited.

THE MASTER OF THE ROLLS overruled both sets of exceptions.

The case, however, coming on for further directions,

THE MASTER OF THE ROLLS decreed to the effect following:—"There being no charity answering the description of "The Jews' poor, Mile End," his Lordship doth declare that the charitable legacy of 1000*l.* three and a half per cents, given by the testator's will to "the Jews' poor, Mile End," ought to be applied to charitable purposes, having regard, as near as may be, to the objects intended by the said testator by the said bequest in the said will "to the

(a) 3 Mer. 48.

(b) 2 Amb. 524.

(c) 7 Ves. 36

(d) Amb. 422.

(e) 5 Russ. 112.

1839.—Ward v. Painter.

Jews' poor, Mile End ;" and it appearing to the court that there are at Mile End, in the county of Middlesex, two charitable institutions only, for the relief of poor persons of the Jewish persuasion, namely, an hospital called "Beth Holim," situate in Mile End, Old Town, founded in the year 1747 by the members of the congregations of Spanish and *Portuguese Jews, [*84] for the sustenance and relief of poor and destitute Jews of that congregation, and 'an hospital called "The Jews' Hospital," situate at Mile End aforesaid, for the relief of the Jewish poor of the class denominated German Jews, and that S. L. B., &c., are the treasurers and wardens of the said hospital called "Beth Holim," and that M. S., &c., are the trustees of the said charitable institution called "The Jews' Hospital, Mile End," his Lordship doth order a moiety of the fund to be paid to the treasurer and wardens of the hospital called "Beth Holim," to be applied by them for the general purposes of the said hospital, and the other moiety to be paid to the trustees of the "Jews' Hospital, Mile End," to be applied by them for the general purposes of that institution. (a)[1]

*WARD v. PAINTER.

[*85]

1839 : July 24.

In May, 1819, a party took the benefit of the insolvent act then in force ; he subsequently acquired property, and died leaving more than sufficient to pay his debts contracted after his insolvency. The scheduled creditors remaining unpaid : Held, that a bill might be maintained by one of such creditors against the personal representatives of the insolvent, without the previous sanction of the Insolvent Debtors' Court, for payment, out of the surplus assets, of the scheduled debts. .

THIS case came before the court on general demurrer.

The effect of the statements of the bill was as follows :—On the 12th of May, 1819, Richard W. Painter was discharged under the insolvent debtors' acts then in force, having previously duly complied with all the provisions of the said acts, and having assigned his estate to the provisional assignee, and having signed a schedule in the usual manner. The insolvent was at the time indebted to the plaintiff in the sum of 25*l.*, for which amount his name was inserted in the schedule.

The insolvent had no estate or effects at the time of his discharge, but he afterwards carried on trade and acquired considerable property. He died in

(a) His Lordship acted similarly with respect to some of the other charities ; and on further directions, the legacy to "the preachers in the Baptist persuasion," was given in the following proportions, namely, one-fourth to "the general Baptist fund," and the remaining three-fourths to "the particular Baptist fund," as being the proportions corresponding with the relative number of preachers or ministers in each of such denominations of Baptists ; and the legacy to the "Quakers' preachers" was given to the "meeting for sufferings" of the Quakers.

[1] Vide *Hayter v. Trego*, 5 Russ 113, 115 n. 1. *Attorney General v. The Ironmongers Company*, post 313.

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February, 1837, having bequeathed the whole of his property to his widow, who took out administration, paid all his debts except those due at the time of the insolvency, and retained the surplus, which amounted to 3000*l*. The debts due at the time of the insolvency, and amongst them the debt due to the plaintiff still remained unpaid.

On the 31st of May, 1839, the plaintiff filed this bill, "on behalf of himself and all other the unsatisfied creditors of Richard W. Painter," against the administratrix, for payment out of the assets, first, of the debts (if any) contracted subsequent to the insolvency, and afterwards of the debts owing at the time of his discharge under the insolvent act.

[*86] "No application was stated to have been made to the Insolvent Debtors' Court to authorize this suit.

The defendant put in a general demurrer, for want of equity.

The act in force at the time at which the insolvent was discharged. (12th May, 1819,) was the 53 G. 3, c. 102, as amended by the 54 G. 3, c. 23, and continued by the 59 G. 3, c. 129, the principal provisions of which, so far as they bear upon the case, are stated hereunder.(a)

(a) The tenth section of the 53 G. 3, c. 102, after enacting, that in case the prisoner should be adjudged to be entitled to the benefit of the act, and directing the court to appoint assignees of his estate, proceeds, "and shall order proper conveyances and assignments of such estate and effects to be made by such prisoner according to this act, together with an engagement, to be executed by such prisoner, to pay so much of the just debts and demands of the several persons against whom such prisoner shall by such court be adjudged entitled to the benefit of this act, as shall not be paid out of the estate and effects to be conveyed and assigned by such prisoner for such purpose, in case he or she shall at any time thereafter be enabled to pay such debts and demands, or to pay such part or parts thereof as he or she shall be able at any time to pay;" and after ordering the prisoner's books, &c., to be delivered up, and the prisoner's discharge, it proceeds as follows:—"and judgment shall thereupon be entered in such court against such prisoner in pursuance of such engagements as aforesaid, which judgment shall and may, if the said court shall so order, be executed against the future estate and effects of such prisoner, real and personal, as the said court shall direct, and shall bind the assets of such prisoner, real and personal, in the hands of his heirs, executors and administrators, for the full amount of the debts and demands aforesaid which shall remain unsatisfied, or so much of such debts and demands as the said court shall be of opinion ought to be satisfied, and execution shall be had upon such judgment in such and the same manner as execution may be had upon a judgment of the Court of King's Bench, nevertheless according to the orders of the court to be established by virtue of this act, and in conformity to the provisions in this act contained."

The fourteenth section of the same act provides as follows:—"That in case any prisoner who shall have been discharged by virtue of this act shall become able to pay all or any part of the debts due from him or her, and against which he or she shall have obtained such discharge, *after a reasonable allowance for the maintenance of such debtor and his or her family*, and payment of his or her debts contracted after such discharge, or to which such discharge did not extend, it shall and may be lawful for any creditor or creditors against whom he or she shall have obtained such discharge, to apply to the court for liberty to proceed against such debtor notwithstanding such discharge; and in case it shall appear to the satisfaction of such court that such debtor is of ability to pay such demand or any part thereof, it shall be lawful for such court to revoke such discharge, either wholly or upon payment of such sum or sums of money for the benefit of the persons against whom such discharge shall have been obtained, either in gross or by several payments, as to such court shall appear reasonable, or to permit execution to be taken out on the judgment entered up

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*Mr. Tinney and Mr. Teed, in support of the demurrer :— [87]
 In argu; this demurrer it is necessary to impugn the decision
 of Sir John Leach in *Barton v. Tattersall*; *but a single decision on [88]
 the construction of an act of Parliament which has never been

in such court on the engagement of such prisoner, for such sum of money as the said court shall think fit, to be distributed rateably amongst the creditors entitled under such engagement; and such proceedings shall and may be had, according to the discretion of the said court, from time to time until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as such court shall think fit to award."

By the seventeenth section it is enacted, "That in case any prisoner who shall have been discharged by virtue of this act shall die leaving assets, real or personal, after payment of all his or her debts, exclusive of the debts from which such prisoner shall have obtained such discharge, it shall be lawful for the person or persons entitled to so much of such debt or debts, from which such discharge shall have been obtained as shall remain unpaid, to apply to the said court for liberty to proceed on the judgment entered in the said court, on the engagement of such prisoner, in order to obtain payment of so much of such debt or debts as shall then remain due as aforesaid, and such court shall make such order thereupon as shall be just; and the heirs, executors or administrators of such deceased prisoner shall apply the assets in his, her or their hands according to such order, but without prejudice to the demand of any other creditor or creditors of such deceased prisoner, all of which shall be first paid or satisfied: provided always, that in case it shall at any time be made appear to such court that the estate or effects of such prisoner conveyed or assigned under the authority of this act would have been sufficient, if carefully and properly managed, to have satisfied all the debts from which such prisoner has been discharged, or to have satisfied a larger proportion of such debts than shall have actually been paid therewith, then and in any such case such court shall not authorize any further proceedings against such prisoner, or his or her assets, except for so much of the debts of such prisoner as could not have been satisfied out of the estate and effects so conveyed and assigned, in case the same had been carefully and properly managed, and rendered productive for the discharge of such debts: provided also, that in no case interest shall be allowed on any such debt from the time of such discharge, until the said court shall order that interest shall again run upon debts bearing interest, which shall be wholly in the discretion of the said court as hereinafter provided.

By the thirty-second section, if any action or suit be brought against an insolvent upon any cause of action from which he has obtained his discharge, except under the order of the Insolvent Court, he may plead his discharge under the act.

This act was amended by 54 G. 3, c. 23, s. 14, by which it is enacted, "That so much of the said act as requires any such prisoner to execute an engagement for payment of the debts or demands of the persons against whom such prisoner shall be adjudged by the said court to be entitled to the benefit of the said act, and as directs any proceeding on such engagement, shall be and the same is hereby repealed, and instead thereof the said court shall require such prisoner to enter into a recognizance to the King's Majesty for the full amount of such debts; and it shall be lawful for any creditor or creditors of such prisoner from time to time to apply to the said court to have such recognizance put in suit, and the same shall be put in suit in pursuance of the order of the said court for that purpose, if the said court shall see fit, but all proceedings thereon shall be subject to the order of the said court; and any money which shall be recovered on any such recognizance shall be paid and applied under the order of the said court, in the same manner as any money which might have been recovered under such engagement as aforesaid, and the judgment directed by the said act to be entered thereupon might have been paid or applied under the authority of the said act; and the said court shall in all cases proceed upon such recognizance as the said court might have done under the authority of the said act, upon the engagement and judgment thereupon by the said act required to be executed and entered as aforesaid."

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affirmed by a superior court is not conclusive, and the point is still open [*89] to *discussion ; besides which, the argument in that case turned principally on the application of the statute of limitations ; no objection was there taken to the jurisdiction, and the executor was not personally interested in the discussion.

This bill is demurrable on the ground that it does not appear that the sanction of the Insolvent Court, authorizing these proceedings, has been obtained. It is clear that the policy of the act in question was to discharge the person of the insolvent, and, subject to one qualification, to release his future estate from the demands of the creditors included in his schedule ; the object of the legislature was, that upon an insolvent transferring the whole of his property to his creditors, he might, unfettered by prior debts, have an opportunity, by future industry and exertion, of maintaining himself and family, and of retrieving his ruined fortune ; and if he should succeed, then the Insolvent Court was to have the power of ordering a portion of his future acquired property to be applied in liquidation of the unpaid scheduled debts ; it is plain,

however, that no proceeding could be taken, except under the sanction [*90] of the Insolvent Court, for he *could plead his discharge in bar. A

discretionary power was thus vested in the Insolvent Court, not only as to whether any proceedings ought to be taken, but also to limit their extent, and to determine whether interest ought or not to be allowed on the debts. In the exercise of this discretion the Insolvent Court was to take into consideration the past conduct of the insolvent, the extent of his property, the wants of his family, and under the seventeenth section, whether his assets had been carefully and properly managed by the assignees. The defendant is entitled to the exercise of the discretion of that court, whose decision is final, and from which there is no appeal to this court. Until that court has exercised this discretion, the plaintiff has no *locus standi* in this court, for the Insolvent Debtors' Court might, upon an application being made, refuse their sanction to these very proceedings.

The right of the plaintiff is founded not on any equity, but on the legal title which he is supposed to possess, and upon that legal right he applies to this court for the administration of the insolvent's assets. If his legal title fails, this suit cannot be supported. Now suppose that the plaintiff had brought an action at law, without the sanction of the Insolvent Debtors' Court, to recover his debt of 25*l.*, the defendant might plead the insolvent's discharge in 1819, which would be a complete bar to the action. The plaintiff, therefore, having no legal demand, cannot support this suit, and the demurrer ought consequently to be allowed.(a)

Mr. *Pemberton* and Mr. *Grubb*, contra :—The decision of Sir John [*91] *Leach* in *Barton v. Tattersall* must govern *the present case and determine the demurrer. That case was decided after full argument

(a) The objection as to the statute of limitations was not raised in the argument ; but as to this point, see *Browning v. Paris*, 5 *Meeson & W.* 117.

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and a week's consideration; it was afterwards brought before the consideration of the same judge; (a) and though it does not appear to have been affirmed by any subsequent reported decision, yet it was acquiesced in, and has been frequently referred to and recognized in subsequent cases; *Threlton v. Hornby*, (b) *Ex parte Barrington*, (c) *Ex parte Fenwick*, (d) *Kaye v. Fosbrook*, (e) *Curtis v. Sheffield*. (g)

The act of the 53 G. 3, c. 102, s. 10, directed the insolvent to give an engagement for payment of his debts; this was varied by the 54 G. 3, c. 25, s. 14, which directed a recognizance to the King to be entered into by the insolvent to the amount of his debts, and his creditors were then to have liberty to apply to the court to put it in suit; it was, however, found in practice, that the Insolvent Debtors' Court had no authority to enforce a judgment on the recognizance, so that the provisions of the act for the payment of the debts out of subsequent assets were found nugatory. An intention was, however, clearly manifested, that the future assets of the insolvent should be made available for the payment of his unpaid scheduled debts; and the means intended by the legislature for enforcing payment having failed, this court, exercising its ordinary jurisdiction, has lent its aid to carry out the plain intention of the acts. This was the ground of Sir John Leach's decision in *Barton v. Tattersall*.

*No argument can be raised from the subsequent acts (h) which [*92] have remedied this defect.

That no previous application to the Insolvent Court is necessary appears, from the fact that in *Barton v. Tattersall* none had been made.

Mr. Tinney, in reply.

THE MASTER OF THE ROLLS:—This is a bill filed by a creditor of a deceased insolvent debtor. It appears from the allegations in the bill, that in 1819, Painter, the insolvent, was indebted to the plaintiff in 25*l.*, which sum is sought to be recovered by this suit. In May, 1819, Painter took the benefit of the insolvent debtors' act, and was discharged from prison. It is alleged that he had no estate and no assets; and that no assignee was appointed, other than a provisional assignee. After his discharge he acquired considerable property, perhaps by the most meritorious industry; but I must observe, that, notwithstanding this, he had a moral obligation to discharge his debts, which was as high, at least, as any other duty or obligation. He is said to have accumulated 3000*l.*, and he died in 1838, having made a will disposing of his estate in favor of the defendant, who is now his legal personal representative. In this state of things, the plaintiff's bill is filed to have his debt, and the other debts of the insolvent which are similarly circumstanced,

(a) 2 Russ. & Myl. 542.

(b) 1 Younge & Coll. 172, 333. (c) 2 Mont. & A. 257.

(d) 2 Mont. & A. 682.

(e) 8 Sim. 30.

(g) 8 Sim. 177.

(h) The subsequent insolvent debtors' acts are 1 G. 4, c. 3; 1 G. 4, c. 119; 3 G. 4, c. 123; 5 G. 4, c. 61; 7 G. 4, c. 57; 1 W. 4, c. 38; 2 & 3 W. 4, c. 44; 6 & 7 W. 4, c. 44; 1 & 2 Vict. c. 110.

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discharged out of such part of his assets as will remain after satisfying
 • [*93] his debts contracted subsequently to the insolvency. To *this bill the defendant has demurred, and it is admitted that I cannot allow this demurrer without overruling a solemn decision of Sir John Leach, in which this very point was raised, and, whether fully argued or not, was certainly decided by him. I am asked to overrule a case so decided, which although it has not been directly under discussion has nevertheless been several times since referred to without disapprobation. I am not, it is true, absolutely bound by a single decision of a co-ordinate jurisdiction; the law of England not only allows the review of any judgment, but also the free discussion of the propriety of any legal decision; and, therefore, I would put no restraint on the counsel for the defendant in the argument of the case; but a solemn decision of a competent judge is by no means to be disregarded, and I ought not to overrule it without being clearly satisfied in my own mind that the decision is erroneous; my not being so satisfied, is a sufficient reason for overruling this demurrer, thinking, as I do, that if *Barton v. Tattersall* is to be overruled, it should be overruled by a higher tribunal.

The question, however, is really very simple: the acts for the relief of insolvent debtors were intended to relieve them from imprisonment, and were not intended to discharge their after acquired estate. The insolvent was left at liberty to acquire additional property, which however was to be subject to his debts still remaining unpaid: an application was indeed to be made to the Insolvent Debtors' Court for regulating the payment, yet it was intended that the debts should, if possible, be paid; and I think that a main feature of the act is, that the after acquired assets are to be applied in discharge of the unpaid debts, the moral obligation for paying which remains the same. It is quite unnecessary in this case to look to that part of the act which re-
 [*94] lates to the liability *of the after acquired assets of the insolvent during his life, the only part to be referred to is that part which relates to the application of his assets after his death, and for which purpose it was intended to make available the judgment and recognizance; but if that remedy fails, the ordinary jurisdiction of the Court of Chancery in affording a remedy where there is a right is not ousted; and if the remedy in the other court fails, can it be said that this court will withhold relief? One of the principal branches of its jurisdiction is the administration of assets, and in this case there are debts unpaid and assets to meet them; there is also a distinct authority for applying the remedy sought by the bill; I must therefore overrule the demurrer.(a)

(a) This case has been heard on appeal by the Lord Chancellor, but no judgment has yet been delivered. [Affirmed, 7th November, 1840.]

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[*95]

1839; June 2, 10.

Where a testator makes distinct gifts by distinct codicils the presumption is, that the subsequent gifts are additional, and that the testator, when he made the last had not forgotten the former, and did not mean to make the last either in vain or in substitution for the former; but this presumption may be strengthened or rebutted by any circumstances which by just inference and presumption, may enable the court to ascertain the real intention of the testator. The nature of the legacies and the extent of interest in them which is given are very material circumstances, but the court also regards the situation of the testator with respect to the persons for whom he is making provision, and the other directions which he may have given.

A legacy of 5000*l.*, subject to be divested if the legatee should die before attaining twenty-one or marriage, would not be considered as a repetition of or substitution for two legacies of 1000*l.* and 4000*l.* not subject to be so divested and given by a subsequent codicil.

By the first codicil the testator gave to his illegitimate daughter Phillis an annuity of 100*l.* a year and a sum of 1000*l.*, with a power to the trustees to advance 250*l.* for her benefit. By the second codicil the testator merely revoked the appointment of a trustee. By his third codicil he gave Phillis a debt of 1546*l.* sterling, a legacy of 1000*l.* and one of 4000*l.* when his estates were cleared of all present demands on them. By a fifth codicil he charged two estates with 5000*l.* each for his illegitimate daughters Phillis and Sybil, to be divested on their dying under twenty-one or before marriage. By a subsequent codicil he confirmed his will and the second codicil (which varied the trustees only,) and also (though inaccurately describing it) the fifth codicil; and after reciting that he had by one or both of the codicils to his said will in a sufficient manner provided for Phillis, he gave to his illegitimate daughters Sybil and Clara an estate similar in all respects to that which by his said codicil or codicils he had given to his said other daughter, and he declared that Sybil and Clara should have the same provision as he had made for his other daughter: Held, that the legacies were not cumulative, and that the daughters were entitled to the provision made by the fifth codicil only.

THE question in this case was, whether certain bequests which were made by several testamentary instruments were cumulative or substitutional.

The testator having by his will, made in England on the 19th of January, 1808, made provision for his wife and children, soon afterwards went to the island of Tobago, and whilst there made a codicil dated the 18th of July, 1812, and thereby intending to provide for Edward and William, two illegitimate children, and such other children as he might have by Eliza Mackenzie, he desired that three female slaves (which he gave to Eliza Mackenzie for life) and their increase might be valued *at her death, [*96] and that the value of them might be divided among the children. And he gave to each of the children an annuity of 100*l.*, to be paid to Eliza Mackenzie for their support and maintenance until they respectively attained twenty-one years, and after that time for their own use and benefit. And he gave to his brothers, George and Joseph Robley, and William Brassuell, in trust for his natural children, the sum of 1000*l.* each to be raised as soon as might be convenient out of his estate, and to be paid to the children as and when they respectively attained twenty-one; but the trustees were permitted to make an advancement of 250*l.* for the benefit of each child.

The testator made a second codicil to his will on the 30th of August, 1813, and thereby excluded a Mr. Charles Brooke from being an executor

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and trustee of his will; but this codicil did not affect the interest of the natural children.

In the year 1814, Edward and William, the two illegitimate children named in the first codicil, died, and in 1814, and 1815, two other children named Frederick and Phillis Saida were born; and after the testator's death the first codicil was found with the names of Edward and William obliterated, and the names of Frederick and Phillis Saida substituted instead of them. The infant Frederick died in the year 1816, and Phillis Saida alone survived. In this state of things the testator made a third codicil dated the 15th of June, 1817: he thereby, as he said, re-executed his will and two first codicils, and having appointed James Cunningham an executor and trustee of his will and estate, he proceeded to appoint him guardian and trustee of his natural daughter Phillis Saida and any other natural [*97] child he might have, in which trust he joined his cousin, Paul *Kneller Smith; and reciting that he had in the hands of his said cousin 1546*l.* sterling besides interest thereon, he gave the same to his natural daughter Phillis Saida, and in the event of her decease to her mother, Eliza Mackenzie; and in the same codicil he afterwards gave the further sum of 1000*l.* sterling to Phillis Saida, and when his estates were cleared of all present demands upon them, incurred by him or charged upon them by him, the further sum of 4000*l.* sterling.

The testator made a fourth codicil dated the 18th of June, 1817, which had no bearing on the present question.

In the year 1818, the testator had another natural daughter called Sybil, and he made a fifth codicil dated and signed the 9th of January, 1819, but which was re-executed in the presence of three witnesses on the 26th of October, 1821, and thereby, after reciting that he had purchased two estates and certain slaves, he expressed himself as follows: viz. "Now I do hereby declare that the said two estates and the slaves now thereon (about 312) are subject to the terms and conditions of my last will, with this further proviso and condition, that they are expressly charged with the two several sums of 5000*l.* to James Cunningham and Paul Kneller Smith, their executors and administrators, in trust for my two natural daughters, Phillis Saida and Sybil (lately born,) to be paid when and as soon as my executors may deem it convenient to my estate, and that in the mean time the said two sums shall bear interest, and the said interest be annually paid from the time of my decease, the interest to be applied for their support and education in England or the United States, and the principal shall be paid to them when twenty-one years, or married with the consent in writing of the said trustees. [*98] And, if this *my bequest should, for want of any legal formality or otherwise, not be effectual to charge these estates, I hereby declare that the said two legacies and the interest to grow due thereon shall be a charge on my whole estate, both real and personal, and payable thereout;

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but if either dies before twenty-one or marriage, her share shall sink into my personal estate, and also if either dies making no will."

Another daughter, Clara, was born in 1821, and the testator afterwards made a sixth codicil dated the twenty-sixth of October, 1821, which was as follows :—

I do hereby make and publish these presents, as and for a codicil to the last will and testament of me, John Robley, bearing date in the month of December, 1807, or in the month of January, 1808, and desire that these presents may be annexed to and taken as parcel of the same will. And I hereby confirm and republish my said will, and the several codicils thereto respectively bearing date in or about August, 1813, and in or about January, 1818, by me made and executed, and intended to be taken as parcel of and annexed to the same will. And whereas, in and by one or both of the codicils to my said will, I have in a sufficient manner provided for my natural daughter Phillis Saida, therein described, by Eliza Mackenzie Robley of the said island, and am desirous of making similar provision for my other children by the said Eliza since that time born, I do therefore give, devise and bequeath to my said other daughters by the said Eliza, named Sybil and Clara, and to each of them, an estate similar in all respects to that which by my said codicil or codicils I have given, devised and bequeathed to my said other daughter by the said Eliza; and I do hereby declare that the said Sybil and Clara, and each of them, shall have the same *provision [*99] as I have made for my said other daughter; and further, that the said provision for the said Sybil and Clara shall be charged and chargeable upon and payable out of my property in the same manner, in all respects, as the provision for my other daughter aforesaid.

To this codicil there was added a memorandum, to the effect that the codicil therein mentioned to bear date in the month of January, 1818, was, not duly attested to pass real estates, and that it was then re-executed by the testator.

The testator died in November, 1821, leaving his daughters Phillis Saida, Sybil and Clara him surviving, but Clara afterwards died an infant.

The question was, whether the several gifts to the testator's illegitimate daughters were cumulative or substitutional.

Mr. *Pemberton* and Mr. *Puller*, for the plaintiffs, contended that each of the daughters was entitled to 5000*l.* only, being the amount of the legacies given by the fifth codicil: they cited *Benyon v. Benyon*, (a) *Warren v. Warren*, (b) *Foy v. Foy*, (c) *Osborne v. The Duke of Leeds*. (d)

Sir *C. Wetherell* and Mr. *John Romilly*, for Phillis Saida, and Mr. *Kindersley* for Sybil, contended that the gifts were cumulative, and that the daughters were entitled to the aggregate amount of the several legacies given

(a) 17 Ves. 34.

(c) 1 B. C. C. 393, n. S. C. 1 Cox, 163.

(b) 1 B. C. C. 305.

(d) 5 Ves. 369.

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by the different codicils: they cited *Bailie v. Butterfield*,^(a) *Hodges v. Peacock*,^(b) *Wray v. Field*,^(c) **Mackenzie v. Mackenzie*,^(d) *Watson v. Reed*,^(e) *Gordon v. Hoffman*,^(g) *Guy v. Sharp*,^(h) *The Attorney General v. George*.⁽ⁱ⁾

Mr. G. Richards and Mr. Sharpe for the executors.

July 10.—THE MASTER OF THE ROLLS:—The question argued in this case is, whether the gifts made by the testator, John Robley, in favor of his natural children, by several codicils annexed to his will, are cumulative, or whether upon the true construction of the codicils, the last gift is not to be taken in substitution for the former. [His Lordship stated the will, and the first, second and third codicils.]

It is to be observed, that by the first codicil, the annuity of 100*l.* was to be paid to the mother for the support and maintenance of the children during their minorities, and that the two Robleys (the brothers) and William Brassnell were trustees of the portions of 1000*l.*, and had power to advance 250*l.* for each child out of its portion; and that the third codicil, although it purports to re-execute the first, takes no notice whatever of the provisions thereby made, for any of his natural children, or for the provision thereby made for Phillis Saida, if her name was then substituted for that of William in the first codicil, but proceeds, as if no previous provision had been made, to appoint guardians and trustees, and to give to Phillis Saida a specific legacy bearing interest, and other pecuniary legacies of greater amount than the legacies given by the first codicil.

[*101] *If we regard only the nature and amount of the legacies given by the two instruments, I think that the legacies given by the third codicil would not, according to the rules acted upon by this court, be considered as a substitution for the legacies given by the first codicil. The specific legacy of 1546*l.*, and the two further legacies of 1000*l.* and 4000*l.* without power of advancement, would not I think be considered as a substitution for the reversionary value of three slaves and their increase, for the annuity of 100*l.* and for the legacy of 1000*l.* with power to advance 250*l.*; but cases of this kind are to be determined by presumptions, and we must look to all the circumstances.

When a testator makes distinct gifts by distinct codicils, the presumptions are that the gifts made by the subsequent codicils are additional to those made by the former, and that the testator when he made the last had not forgotten the former, and did not mean to make the last either in vain or in substitution for the former; but these are only presumptions, and they may be strengthened or rebutted by any circumstances which by just inference and presumption may enable us to ascertain what the intention of the testator really was. The nature of the legacies and the extent of interest in them

(a) 1 Cox, 392.

(b) 3 Ves. 735.

(c) 2 Russ. 257.

(d) 2 Russ. 262.

(e) 5 Sim. 431.

(g) 7 Sim. 29.

(h) 1 Myl. & K. 589.

(i) 8 Sim. 138.

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which is given, are very material circumstances, but we must also regard the situation of the testator with respect to the persons for whom he is making provision, and the other directions which he may have given. This testator had placed himself *in loco parentis* with regard to the children of Eliza Mackenzie, and he was making provision for them as for his own children, and the fact his of having appointed trustees and guardians with reference to the provision he was making by the third codicil, and omitted to notice the trustees which he had appointed by the first codicil, and the provisions thereby *made, cannot be immaterial in the consideration of the ques- [*102] tion, whether the two provisions were to be accumulative, or the last was to be taken in substitution for the first.[1] It is not probable that the testator intended to have at the same time one set of trustees for the provision made by the third codicil. and another set of trustees for a distinct sum of 1000*l.* given by the first codicil,—that Mr. Cunningham and Mr. Smith should be guardians and trustees, whilst the power of advancing 250*l.* was vested in the two Robleys and Brassnell, and whilst under a positive direction in the first codicil, the mother was to receive the annuity of 100*l.* for the support and maintenance of the children.

[His Lordship stated the fourth codicil of the 18th of June, 1817, the birth of Sybil, and the fifth codicil of the 9th of January, 1819, and proceeded.]

Upon this codicil it may be observed, that if we regard only the legacies and the interest in them which is given to the legatees, a legacy of 5000*l.*, subject to be divested if the legatee should die before attaining twenty-one or marriage, would not be considered as a repetition of or substitution for two legacies of 1000*l.* and 4000*l.* not subject to be so divested, but the fifth codicil appears to make a complete and reasonable provision for the children; interest on the charges is to accrue from the time of the testator's death, and to be applied for the support and education of the children, and the legacies themselves, as soon as the executor may deem it convenient to the estate, are to be paid to the legatees on attaining twenty-one or marrying; and are only to be divested in case of death before twenty-one or marriage. This is in its nature reasonable, and the directions comprised in it, particularly that which orders the interest to be applied for the support and maintenance of the children in England or the United States, *are scarcely consistent [*103] with the co-existence of the direction in the first codicil, that the annuity of 100*l.* for the support and maintenance of the children should be paid to Eliza Mackenzie. It does, however, appear to me, that upon the construction of the first, second and fifth codicils, and having regard to the presumptions and indications of intention on which this court relies, the question would in this case have been very doubtful. But the case does not rest here :

[1] As to the effect of a person's placing himself *in loco parentis*, and the effect of that relationship, in regard to *double portions*,—a topic analogous, if not identical with the subject discussed in the text; see *Powys v. Mansfield*, 3 Myl. & Cr. 359. *Pym v. Lockyer*, 5 Myl. & Cr. 29. For a copious statement of the last cited case, see the Editor's note, 3 Myl. & Cr. 379, n. 1.

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another daughter, Clara, was born in the year 1821, and the sixth codicil is dated the 26th day of October in that year. In this codicil the testator expresses himself thus: [His Lordship stated that part of the codicil by which the testator confirmed and republished his will, and the several codicils *stated to bear date* in or about August, 1813, and in or about January, 1818, and proceeded.]

From this first passage and the uncertainty and inaccuracy with which the testator mentions the dates, it would seem that he had not the will and the codicils referred to before him at the time when this codicil was written, but from the fact appearing that the codicil of January, 1819, was re-executed on the day of the date of the sixth codicil, it seems clear that the codicil of the 9th of January, 1819, was the one referred to, and was before the testator at the time when the sixth codicil was executed. The codicil of August, 1813, removed Mr. Brooke from being an executor and trustee, and was important to be noticed when the will was republished and confirmed, but it did not mention the children. The codicil of the 9th of January, 1819, contained the particular provision I have mentioned, complete in itself, but so made and expressed as to make it doubtful whether that provision was all or only part of that which the testator intended the children to have; [*104] and the sixth codicil, after containing a devise not *material on this occasion, proceeds as follows: [His Lordship stated the remainder of the sixth codicil.]

And upon this codicil it appears to me, that the testator, referring to the provision which he has made for Phillis Saida by the fifth codicil, and thus expressly reciting that he has thereby sufficiently provided for her, makes his intention clear that he did not intend her to have that provision which in itself he considered sufficient, in addition to other provisions mentioned in former codicils to which he did not refer. Wishing to provide for his three natural daughters, and seeming to think, when the sixth codicil was written, that Phillis Saida only was provided for by the 5th, he refers to that codicil, recites that he thought the provision thereby made for her sufficient, and desires that Sybil and Clara may be in all respects made equal to her; and whatever doubts may arise upon the former codicils, I think that the sixth codicil sufficiently indicates, that the several gifts are not cumulative; and that Phillis Saida and Sybil are only entitled to the provision made for them by the fifth codicil.[1]

[1] When a legacy is to be deemed cumulative or substitutional, see further the cases cited by the Editor, 2 Russ. 275, n. 2.

 1839.—The Attorney General v. Shearman.

THE ATTORNEY GENERAL v. SHEARMAN.

1839: March 28, August 7.

This court has authority to exercise a discretion in charity cases; and where it appears that the prosecution of accounts and inquiries would not be beneficial but prejudicial to the interests of the charity, the court will refuse them. The court also discourages long and expensive litigation in charity cases for matters of small value.

THE facts of this case are stated in the judgment of the Master of the Rolls.

Mr. *Pemberton* and Mr. *O. Anderdon*, for the relators contended that the lease stated in the judgment of the *Master of the Rolls, [*105] though signed by a majority of the trustees, was a nullity, and that the rent was inadequate. They asked that the lease might be declared void, that a reference might be made to the Master for the appointment of new trustees, and that the representatives of John Shearman might be charged with the sums referred to in the judgment of the Master of the Rolls, and might pay the costs.

Mr. *Barber* and Mr. *G. Richards*, contra.

Mr. *C. P. Cooper*, for Mr. *Ward*, one of the trustees.

August 7.—THE MASTER OF THE ROLLS:—This is an information filed by the Attorney General, at the relation of James Hirrell Limmer and John Nicholls, against John Shearman and others, praying that the defendants John Shearman and his son, and such others as to the court might think proper, might be removed from being trustees of the charity estates in question; that in case of need, an account might be taken of the rents received by the defendants, and particularly by John Shearman; that it might be declared that John Shearman ought to account for moneys charged by him for land tax, repairs and other outgoings; that if the estate ought not to be vested in the churchwardens and overseers new trustees might be appointed; that a lease dated the 18th of August, 1826, might be declared to be invalid, and might be set aside and cancelled; that the defendants Isaac Last and Henry Last might pay 5*l.* 12*s.* 6*d.* or such other annual sum, by way of increased rent, as might seem just; and for further relief.

*This cause came on to be heard before the present Lord Chan- [*106] cellor when he was Master of the Rolls, and on the 6th of June, 1835, he decreed, that as to the defendants Isaac Last and Henry Last, the information should be dismissed with costs; and that the information, except so far as it sought to have a scheme approved for the future management and application of the charity estate, should be dismissed as against all the other defendants, without costs; and he referred it to the Master, to approve of a proper scheme for the future management and application of the charity estates, and the rents and profits thereof.

The relators not being satisfied with this decree, presented a petition to

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have the cause re-heard at the Rolls ; it would, I think, have been better if they had taken the case before the Lord Chancellor himself, as they had the opportunity of doing ; but conceiving that they had a right to adopt the course they have done, I have considered the whole case.

The nature of the charity and the mode in which its funds have been applied, make it clear that a scheme must be provided for the future management and application of the property ; and that part of the decree which directs a reference for that purpose is not complained of.

A part of the charity estate consisted of a farm which, on the 4th of August, 1813, had been let to Isaac Last, for a term of fifteen years from Michaelmas 1812, at a rent of 52*l.* a year.

It seems that some time before, or in the year 1826, the defendant John Shearman had, by some means, and, as it is said, by means of his connections among the other trustees, acquired a great influence and ascendancy [*107] *in the management of the charity property ; it is stated that he wished to have all his own way, and would not submit to any control of the other trustees over whom he had not influence : this conduct, no doubt improper, very naturally gave offence to Mr. Ward, another trustee, who justly thought that he and the other trustees ought to be consulted in the management and application of the property. Under these circumstances disputes and quarrels arose.

In 1826, there were eleven trustees, John Shearman and his son George, two persons of the name of Chenery, William Darby, Francis Scotchmer, Mileson Edgar, John Ward, Freeston Howman, John Kerry, and another George Shearman.

John Shearman, being in the management of the property, about July, 1826, appears to have agreed to grant a new lease of the farm to Isaac Last and his son Henry Last ; and Isaac Last, according to the evidence of Mr. French, the solicitor to the trustees, called on Mr. French, and at the request of John Shearman, as he stated, ordered Mr. French to prepare a lease, similar in every respect to the then subsisting lease, except that the name of Henry Last was to be added as joint lessee. Mr. French accordingly prepared the lease, and Henry Last called for it and took it away, as he said, to get it executed by the trustees ; and the trustees having been called upon for the purpose, it appears to have been executed by John Shearman and George his son, by the two Chenerys and by Darby and Scotchmer : Mr. Ward refused to sign because he had not been consulted, and because he did not know on what terms it had been made ; Kerry and George Shearman the shopkeeper refused because Ward did, and Mr. Edgar and Mr. How- [*108] man also refused ; but the lease having been executed *by a majority of the trustees, the two Lasts have held the farm accordingly.

Mr. Ward having been informed of the new lease, considered as to the means of setting it aside : a meeting of the dissentient trustees was held on the 9th of October, 1826 ; they acted as if the new lease were invalid, and

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resolved that the church wardens should take immediate steps for letting the farm. This meeting, however, does not appear to have produced any result; and on the 22d of March, 1827, a meeting of eight trustees was held and attended by Mr. Ward and Mr. Edgar, two of the dissentients, and by the six who had signed the new lease. At this meeting the trustees resolved as follows:—Resolved that the farm at present occupied by Isaac Last is, in the estimation of the trustees here present, worth, to be let, 25s. per acre. Resolved that the whole property described in the feoffment of 1813, be surveyed and mapped by Mr. John Hayward of Stoke. Resolved that the farm now occupied by Last, when surveyed and mapped, be offered to him at the before-mentioned rent of 25s. per acre, for the term of eight years from Michaelmas next. Resolved that the last Monday in February every year be the day for auditing the accounts of the above charity; and that the meeting be held at the sign of The Bottles, in Occold, and that Mr. John Shearman be appointed trustee to receive the rent due on Lady-day in each year.

These resolutions seem to assume that the lease which six of the trustees had granted to the Lasts might be got rid of; and they would scarcely be intelligible, if we did not bear in mind, that the farm was estimated to contain only forty-two acres, which, at 25s. an acre, would amount to 52*l.* 10*s.* 6*d.* per annum, only 10*s.* more than the rent reserved in Last's lease, and *that Shearman swears, that in his belief, a survey of the farm [*109] would prove, that the quantity did not exceed forty-two acres.

The survey was made in 1827, and it appeared that the land contained 46 acres 2 roods and 17 perches, which, at 25*s.* an acre would have produced 58*l.* 3*s.* rent.

It does not appear what, if any, steps were taken in consequence of the survey. Mr. Hayward states that John Shearman accompanied him during part of the time of his surveying the farm, but that he did not communicate the result to John and George Shearman, the two Chenerys, or any of them; he valued the farm as worth 59*l.* a year to let.

The Lasts continued in the possession and to pay the rent to John Shearman, who received it, and appears to have made various allowances for repairs and otherwise; and this state of things continued till the information was filed on the 14th of May, five years after the survey had been made.

What is in substance prayed for is, that the trustees who signed the lease may be removed, that the lease may be set aside, that the Lasts, in addition to the rent they have paid, may pay a further annual sum of 5*l.* 12*s.* 6*d.*, and that John Shearman may be charged with the sums allowed for repairs and outgoings.

It does not appear to me that any case is made against the Lasts; they have held and are holding under a lease executed by six out of the eleven trustees; there is no pretence of fraud or concealment on their part; the only complaint against them is, that they took *a lease which five [*110] trustees refused to sign; there is no evidence of any notice being

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given to them by the dissenting trustees, and in fact they paid their rent to John Shearman, who was formally appointed receiver in March, 1827 ; I am therefore of opinion that the information was rightly dismissed with costs, as against Isaac Last and Henry Last.

The next question is, whether John Shearman ought to have been charged with any sum greater than 52*l.* which he might have received for rent, or with any sums improperly allowed for repairs and outgoings.

As for the rent, it is in this, as in so many other cases, doubtful upon the evidence, whether more than 52*l.* could have been properly and prudently demanded or insisted upon ; though Mr. Watling says he offered 70*l.*, and Last himself was willing to give 62*l.* rather than quit ; it may not have been prudent to insist on more than 52*l.*

The allowances seem to have been considerably more than appear upon the evidence to be justified ; they do not appear to have been a subject of complaint till the information was filed ; the grievance, as George Shearman the shopkeeper says in his evidence, was, that John Shearman wished to do every thing his own way ; Mr. Howman, Mr. Edgar and Mr. Kerry were dissatisfied because of his persisting to do every thing his own way ; but the witness recollects no disapprobation or dissatisfaction as to the application and appropriation of the rents ; Mr. Ward's evidence is to the same effect.

This may be in part accounted for by the fact that accounts were [*111] not rendered to the trustees ; but John Shearman in his answer expressly states, that every year, about Easter Monday, he submitted his accounts to the inspection and examination of the church-wardens at a vestry meeting held in the parish, and he states in his first answer that his accounts, up to the month of April, 1830, were regularly entered at his request in the church-warden's book, and this appears from the books to have been the case, so that the application of the rents was known, and the proof given by the relators, that there was no dissatisfaction, is material.

But not considering it to be proved, that the rent was the best that could have been obtained, or that the rents were strictly applied as they ought to have been, the question arises, whether in such a case as this, having regard to the amount which is in contest, to the circumstances under which the information originated, and to the probability of obtaining any benefit for the charity, accounts and inquiries ought now to be directed.

I have no doubt that the court has authority to exercise a discretion, and that, from the absence of any effectual check elsewhere, it has become absolutely necessary for the interests of charities, that such discretion should be exercised in proper cases.

My predecessor has shown by his decree that he considered this to be a proper case for the interposition of the court, and on a consideration of all the facts proved, I have come to the same conclusion.

I am of opinion that a prosecution of the accounts and inquiries which are sought by this information would be prejudicial and not beneficial to

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the charity, unless more effectual means than the court possesses *could be found, of altogether relieving the charity from costs and [*112] other prejudice to arise from the prolonged litigation in a matter of such small value; it consequently appears to me that I ought not to disturb the decree which has been made. I think it quite proper to discourage long and expensive litigation in charity cases for matters of such small value, and commenced under such circumstances as appear in this instance. On the whole I am of opinion that the decree ought to be confirmed, and that the relators ought to pay the costs of the re-hearing.[1]

BAKER v. NEWTON. NEWTON v. RICHARDS.

1839; July 4.

Bequest of money and leaseholds to a *feme sole* "for her own absolute use, without liberty to sell or assign during her life:" Held, that she took the property absolutely, without power of disposition during her life.

A testator by his will gave the residue of his estate to his wife. By a codicil, "instead of giving the whole of his property, after the legacies were paid, to his wife," he bequeathed 10,000*l.*, the interest of which to be paid her for life, "and then to go to his daughter, and his house and furniture, plate, wines, &c. at K. R., in short, the whole of his property at his decease, except carriage and horses, and his gold repeater; and it was his further wish that she might continue in either house, but not to change, and having the use of the same during her life, wines, spirits &c. included: Held, that the gift by the codicil, beyond the 10,000*l.*, was void for uncertainty.

THE testator by his will, dated the 2d December, 1835, bequeathed as follows:—"I give and bequeath to my natural daughter Harriet Gouthey, now called Harriet Richards, 25,000*l.* and my house No. 4 Clarendon Place, with the whole of the furniture plate china glass wines &c. *for her own absolute use, without liberty to sell or assign during her natural life.* To my dear wife, Ellen Elizabeth Mary Richards, the residue and remainder *of my estate and effects of what nature and kind so- [*113] ever."

The testator made a codicil to his will on the same day, but which he afterwards cancelled.

In August, 1837, the testator's daughter Harriet married Mr. Kelly, and on the 2d of October, in the same year the testator made a codicil to his will in the following terms:—"Codicil. I revoke that part of my will instead of giving the whole of my property after the legacies are paid to my wife I give and bequeath to her 10,000*l.* to be invested in the funds in the names of Joseph Newton, Frederic Kelly and Edward Savage Bailey, the interest of which shall be paid to her during for life and then to go to my daughter now Harriet Kelly, and my house and furniture plate wines &c. at 72 King's

[1] Vide *The Attorney General v. Clark*, 1 *Beav.* 467.

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Road Brighton, in short the whole of my property of my decease except carriages and horses and my gold repeater, and it is my further wish that she may continue in either house (but not to change) and have the use of the same during her natural life wines spirits &c. included.”(a)

The testator died in October, 1837.

The first question was as to the interest which the testator's daughter Harriet took in the legacy of 25,000*l.* On the one hand it was contended, that she took a life interest only, and that the words “during her natural life” limited the extent of her enjoyment of the bequest made to her; and on the other hand it was argued, that she took an absolute interest, and that these [114] words restricted, during her life, her power of disposition, so *that, during her life, the property was to be held by her without power of anticipation.

The next question arose on the codicil, and as to what interest, beyond the life and reversionary interest, in the 10,000*l.* was given to the wife and daughter respectively.

Mr. *G. Richards* and Mr. *Puller*, for the next of kin (other than the widow.)

Mr. *Pemberton* and Mr. *Busk*, for Mrs. Kelly.

Mr. *Kindersley* and Mr. *Bacon*, for the widow.

Mr. *Tinney* and Mr. *J. Russell*, for the executors.

THE MASTER OF THE ROLLS was of opinion that the 25,000*l.* and the house in Clarendon Place were given to Mrs. Kelly absolutely with a restriction against alienation during her life.[1]

On the second point he said, that beyond the gift of 10,000*l.* to the widow for life, with remainder to the daughter, the testator had expressed himself so ambiguously, that the only conclusion he could come to was, that it must be held void for uncertainty.[2]

(a) The punctuation of these passages has been compared with the original will.

[1] Vide *Parks v. Parks*, 9 Paige, 125. *Tawney v. Ward*, 1 Beav. 563, 568.

[2] As to will void for uncertainty, see *Mason v. Robinson*, 2 Sim. & Stu. 295, 300, n. 1. *Waite v. Templer*, 2 Sim. 524.

1839.--Frank v. Mainwaring.

*FRANK v. MAINWARING.

[*115]

1839 : June 5, 7, 8, 10, August 7.

A decree directing the owner of a legal estate to do such acts as are requisite to bar the estate tail, but which are incomplete at his death, is not binding on the succeeding issue in tail.

On a bill to set aside deeds and recoveries, on the ground of the lunacy of the party at the time he executed them, Held, that the finding of the jury on an inquisition, which overreached that period, afforded a presumption that he was then insane ; but there being some evidence, that after the time when the lunacy was stated to have commenced, the party was not of unsound mind, an issue was directed to inquire, whether he was of unsound mind at the time of executing the deeds, &c.

In a suit to set aside deeds, on the ground that their execution had been procured from a person while a lunatic, a trustee, who was alleged to have assisted in procuring their execution, though for no personal advantage, was held an incompetent witness on behalf of the parties taking beneficially under the deeds. Held also, that the wife of the trustee was equally incompetent.

Cross-examination of a witness in equity, to prove exhibits held no waiver of objection to his competency on the ground of interest : but *semble* that the proposition is not true that a witness may be cross-examined to any extent and for any purpose, without waiving the objection to his competency on the ground of interest.

THE plaintiff in this cause, was the grandson Mr. Edward Frank, a clergyman of large fortune, who, in the year 1817 was, amongst other property, entitled, partly as tenant in tail in possession, and partly as tenant in tail in remainder expectant upon the death of his mother, Catherine Frank, to certain freehold and copyhold estates, devised by the will of Margaret Frank.

The bill prayed for a declaration, that Mr. Edward Frank was induced whilst of unsound mind, to execute certain deeds and do other acts, whereby those freehold and copyhold estates became vested in the defendants, Mainwaring and Bellamy, as trustees, and that the same estates might be reconveyed and surrendered to the use of the plaintiff.

The title of Mr. Edward Frank accrued on the death of his father in the year 1812, and in 1817 he had six children, viz : Richard Bacon Frank the father of the plaintiff, the defendants Edward Bacon Frank, Jemima Mary Bacon Frank, Aspelow Bacon Frank, and Rodolphus Bacon Frank, and a daughter, Rosalia Bacon Frank, since dead.

On the 15th day of April, 1817, he executed an indenture of feoffment of that date, with livery of seisin, and made between Catherine Frank of the first part, the Rev. Edward Frank of the second part, Edward Sykes *of the third part, Richard Baxter of the fourth part, Thomas Francis [*116] C. Mainwaring and Thomas Jones Bellamy of the fifth part, Thomas Lee of the sixth part, and William Rowstone of the seventh part : and by that indenture, after reciting the will of Margaret Frank, and that Edward Frank was desirous of providing for the payment of certain debts, and also of making provision for his younger children, and had therefore determined to suffer a common recovery of the estates devised by the will of Margaret Frank, and that Catherine Frank had agreed to concur therein ; it was witnessed, that all the freehold estates were granted to Edward Sykes and his heirs, to

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the intent that he might be tenant of the freshold, to the end that recoveries might be suffered; and the recoveries were to enure, as to part, to the use of Catherine Frank for life, with remainder to the use of Mainwaring and Bellamy in fee, and as to the residue, to the use of Mainwaring and Bellamy in fee; the indenture contained a covenant to surrender the copyholds to Mainwaring and Bellamy and their heirs; and it was declared that Mainwaring and Bellamy were to stand seised and possessed of the freeholds and copyholds, on trust, with the consent in writing of Edward Frank in his lifetime, and after his decease at their own discretion, to sell and convey the estate to any purchasers thereof: there was also a power of mortgaging, and out of the rents and the money to arise by sale or mortgage to pay the mortgages, and the costs of the trust; and to set apart 12,000*l.* to be disposed of in paying debts of Edward Frank; and they were to stand possessed of the rest of the money to arise by the sale or mortgage on the trusts stated in an indenture of even date; and there was a power of attorney to deliver seisin.

The indenture of even date was made between Edward Frank of [*117] the one part, and Mainwaring and Bellamy of the other part; and it was declared, that subject to the payments and deductions directed by the former deed, the trustees were to stand possessed of the moneys arising from the sale or mortgage, in trust for Edward Frank for life, and after his death for his younger children.

Livery of seisin was endorsed on the indenture of feoffment, and the recoveries were soon afterwards suffered, *i. e.* in Easter term 1817, and the copyholds were surrendered.

On the 24th of August, 1820, Mr. Edward Frank gave a consent in writing to sell a portion of the estates, which the trustees accordingly sold in lots; but in June, 1825, a commission of lunacy issued against him, and in the following month of August, he was found to be a lunatic, and to have been so from the 25th of October, 1816.

He continued a lunatic to the time of his death, which took place on the 14th of October, 1834; his eldest son Richard Bacon Frank died in his lifetime, leaving two sons, of whom the present plaintiff was the survivor.

The plaintiff, being the person who would have been entitled to all the estates comprised in the deeds of April, 1817, if no recovery thereof had been suffered, now alleged, that Edward Frank was insane at the time when the deeds of April, 1817, were executed, when the recoveries were suffered, and when the alleged authority to sell was given.

The defendants insisted that Edward Frank was then of sound [*118] mind: they further insisted that by the effect of several references, reports and orders, and by a decree made in the matter of the lunacy and in a cause, the plaintiff was precluded from objecting to the validity of the indentures.

The title of Mr. Edward Frank, of Mr. Richard Bacon Frank, and of the plaintiff, was derived under the will of Margaret Frank, who being entitled

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to the freehold and copyhold estates in question, devised them by her will, dated the 12th day of November, 1765, unto and to the use of Bacon Frank for life, with remainder to trustees to preserve contingent remainders, with remainder to the first, second, third, fourth and other sons of the body of Bacon Frank, (excepting the first,) successively in tail male, with divers remainders over.

Edward Frank was the fourth son of Bacon Frank, and succeeded to the estate under this devise; and Richard Bacon Frank, the plaintiff's father, was his eldest son.

The proceedings which were relied upon by the defendants, took place after the lunacy, and were of the following nature.

In the month of June, 1822, a bill was filed by Edward Frank and his infant children against Mainwaring and Bellamy, praying that the trusts of the deeds might be carried into effect, so far as related to the raising of the money to pay the debts, for an account, and for the removal of the trustees. To this bill Mainwaring and Bellamy put in their answers, and no further proceeding was taken for a long time: a notice was afterwards given to dismiss for want of prosecution, and then a replication was filed.

Frank and Bellamy and wife filed another *bill, and it seemed that [*119] in Hilary term, 1825, when it was called on, it was struck out of the paper. About the time that the second cause was struck out of the paper, three purchasers of portions of the estate which had been sold by the trustees, filed their bills for a specific performance, and that the purchases might be completed. After these bills had been filed, and in the month of April, 1825, a petition was presented for a commission of lunacy, which was accordingly issued on the 19th of June, 1825. Mr. Bellamy subsequently applied to Richard Bacon Frank, the father of the plaintiff, requiring him to confirm the deeds which might be brought into question by the result of the lunacy. Mr. Richard Bacon Frank refused so to do, and having presented a petition, in which he stated himself to be the eldest son and heir at law of the lunatic, an order was made by which it was directed, that he should be at liberty to attend the execution of the commission. The commission was executed in the month of August, 1825, and it was then found that Mr. Edward Frank was of unsound mind, and had been so since the month of October, 1816. Various proceedings took place after the commission: there was a report of the Master as to the state of the family, Sir Bryan Cooke was appointed committee of the estate, and Mr. and Mrs. Bellamy and Catharine Frank were appointed committees of the person. After these proceedings had taken place, supplemental bills were filed by the purchasers to bring the committee of the lunatic before the court. In the month of January, 1828, an order was made, referring it to the Master to inquire, whether it would be for the benefit of the lunatic, and for the benefit of his estate, that the suits of Frank and Bellamy, and of Frank and Mainwaring, should be prosecuted by the petitioner and the committee; and soon afterwards another order was

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[*120] *made referring it to the Master to inquire, what would be the proper course to be taken by the committee with reference to the purchasers' suits; in May, 1828, the Master made his report as to the situation and fortune of the lunatic and his family, and on the 13th of August, 1828, an order (which was much commented upon in this case) was made in the petition of Richard Bacon Frank, the father of the plaintiff, and *he consenting by his counsel at the bar to do all such acts as might be necessary for him to do to confirm the deeds of April, 1817, and the fines and recoveries, and consenting to execute all necessary deeds*, Mr. Bellamy consenting to retire from the trust, and the petitioner being at liberty to name six persons within one month from the date of the order, one of whom was to be approved of by the Master as a new trustee, it was ordered that the petitioner should name six persons within one month from the date of the order, one of whom the Master was to approve of as a trustee in the room of Mr. Bellamy; and the petitioner consenting to confirm the deeds, the Master was to approve of all proper deeds and assurances necessary to confirm the deeds of feoffment and settlement, and for vesting the estates comprised therein in the new trustee and Mr. Mainwaring; costs were then provided for, and Mainwaring and the new trustee were to carry into execution and complete the sales; and the petitioner, (consenting as before,) was to have an allowance of 500*l.* a year made to him for his maintenance. Mr. Richard Bacon Frank did accordingly name six persons, and the Master approved of one of them to be the new trustee. Pending these proceedings, doubts however arose as to the order of

August, 1828, for appointing new trustees, and a reference being [*121] made to the Master, he reported that a bill ought to be filed to *carry that order into effect, and for appointing John Herbert Koe trustee, and an order was made confirming that report. A bill was filed, Mr. Richard Bacon Frank and Mr. Bellamy put in their answers, and *a decree was made on the 7th of May, 1831, by which it was ordered, that so much of the order of the 13th of August, 1828, in the lunacy, as related to the confirmation of the deeds bearing date respectively the 15th of April, 1817, and the recoveries, writings and other deeds and assurances in the bill mentioned, and the appointment of such new trustee as aforesaid, should be carried into effect*; and it was ordered that it should be referred to the Master, to settle the deeds of release, confirmation and appointment, or such other deed or deeds, assurance or assurances as might be necessary, *and Richard Bacon Frank and Edward Bacon Frank and all other necessary parties were to join therein, and do and make all such acts and deeds as the Master should direct*. The Master proposed conveyances, and among other things he proposed, that the deed should contain a covenant by Richard Bacon Frank that he and his heirs and all persons claiming any estate in the hereditaments, should at all times execute any further deeds and assurances as should be necessary; to this, Richard Bacon Frank carried in an objection; he alleged that his concurrence in the deed was voluntary, that he was not bound to en-

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ter into any such covenant, or to covenant for any acts beyond what he himself might be capable of performing. Notwithstanding this objection, the Master made his report on the 23d of March, 1832, and he certified that the estates ought to be conveyed by the trustees, the committee, Richard Bacon Frank the father, and Edward Bacon Frank, who had then attained the age of twenty-one, to the new trustee and his heirs, to the use of Mainwaring and such *new trustee; and that Richard Bacon Frank and [*122] Edward Bacon Frank should levy a fine, which was to enure to the use of Mainwaring and the new trustee; and the Master settled what he considered to be the proper deeds. A petition presented to confirm this report, came on for hearing on the 10th of April, 1832, and then upon the objection of Richard Bacon Frank, the petition was ordered to stand over, in order that a cross petition might be presented by Richard Bacon Frank.

Whilst these proceedings were pending, various proposals were made for raising money to satisfy the charges on the estates and for providing 2000*l.* for an outfit for Richard Bacon Frank, and it being doubtful whether the Master had authority, an order was applied for and obtained on the 26th of March, 1832, whereby it was referred to the Master to inquire, whether any sum should be raised to pay the incumbrances and costs, and, if any, how much; the Master was further to inquire, whether it would be proper to apply for an act of Parliament to carry those proposals into execution. On the 5th of May, 1832, the Master reported, that it would be proper to raise 21,000*l.* on the Norwich, Norfolk and Suffolk estates, (which were not the estates in question in this cause, but other estates to which Edward Frank was entitled;) and he reported that the petitioner on receiving 2000*l.* should purchase from the committee at the price of 21,000*l.* an annuity (beyond the 500*l.* allowance) of 2175*l.*, that the estates should be resettled, and that an act of Parliament ought to be applied for. It appeared afterwards that a larger sum than 21,000*l.* would be wanted; and the authority of the court was obtained to raise the sum of 24,000*l.*, and a bill was then prepared and introduced into Parliament. On the 23d of July, 1832, and shortly after that bill had been introduced into Parliament, Richard Bacon Frank died, *leaving the plaintiff, an infant, and who succeeded in his [*123] right to the estates tail. On the 22d of January, 1833, the committee presented a petition, praying directions, whether any proceedings at law or in equity should be adopted to ascertain the validity of the deeds of 1817. A report on that subject was made on the 12th of June, 1834, but, before any thing was done or could be done upon that report, on the 14th of October, 1834, Edward Frank the lunatic died.

This cause now came on for hearing.

Mr. *Pemberton* and Mr. *Lovat*, for the plaintiff, cited *Clerk v. Rich*,^(a) *Jones v. Roberts*,^(b) *Grindley v. Davies*,^(c) *Simpson v. Lord Howden*,^(d)

(a) 2 Vern. 412.

(b) Shelford on Lunacy, 253; and Reg. Lib. A. 1829, fol. 2147.

(c) Shelford on Lunacy, 266.

(d) 3 Myl. & Cr. 97.

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Picket v. Loggon,(a) *Parkes v. White*,(b) *Ross v. Ross*,(c) *Englefeild v. Englefeild*,(d) *Fox v. Crans*,(e)

Mr. Kindersley and Mr. Koe, for the surviving younger children of the settlor, cited *Faulder v. Silk*,(g) *Cartwright v. Cartwright*,(h) *White v. Driver*,(i) *Sergeson v. Sealey*,(k) *Niell v. Morley*,(l)

Mr. Tinney and Mr. J. Russell, for the defendant Bellamy, cited *Cann v. Cann*,(m) *Blake v. Blake*,(n) *Fletcher v. Tollett*,(o) *Lloyd v. Johnes*,(p) *Giffard v. Hort*,(q)

[*124] *Mr. G. Richards and Mr. Wright, for the defendant Mainwaring, cited *Cory v. Cory*,(r) *Stockley v. Stockley*,(s) *M^r Adam v. Walker*,(t) *Stapilton v. Stapilton*,(u) *Campbell v. Sandys*,(v)

Mr. Willcock, for the executor of the widow of the lunatic.

Mr. C. P. Cooper, Mr. Piggott and Mr. Bacon, for other parties.

August 7.—THE MASTER OF THE ROLLS (after stating the principal facts of the case):—As the parties concerned in the preparation of the deeds in question are not subject to any imputation of fraud or circumvention, the validity of the deeds, and of the recoveries, and of the authority, depends entirely on the answer which may be given to the question, whether Mr. Edward Frank was of sound mind at the respective times when the acts, the validity of which is disputed were done. The inquisition, having overreached those times, affords a presumption that he was then insane, but there is some evidence, that after the time when the lunacy is stated to have commenced, Mr. Edward Frank was not of unsound mind; and having considered the evidence of the witnesses, and the letters of Mr. Edward Frank which have been produced, I think that the question of sanity or insanity cannot be determined without an issue, which must therefore be directed, if the plaintiff is not precluded, by the acts or obligations of his father, from seeking relief.

[*125] *The proceedings which are relied upon by the defendants took place after the lunacy, and they are of the following nature; (his Lordship stated them.)

Upon the best consideration which I have been able to give these proceedings, it does not appear to me that there ever was any waiver or abandonment of the decree of the 7th of May, 1831: the report made by the Master in pursuance of that decree was objected to by Richard Bacon Frank, and was, on that account, not confirmed, when a petition for that purpose was presented; and whilst that report was under consideration, a contemporaneous discussion

(a) 14 Ves. 234.

(b) 11 Ves. 209.

(c) 1 Cas. Bq. Ab. 124.

(d) 1 Vern. 443.

(e) 2 Vern. 304.

(g) 3 Camp. 126. S. C. 1 Collinson on Lunacy, 390.

(h) 3 Phil. 90.

(i) Ibid. 84.

(k) 2 Atk. 412.

(l) 9 Ves. 478.

(m) 1 Vern. 108.

(n) 3 P. Wms. 10, n.

(o) 5 Ves. 3.

(p) 9 Ves. 37.

(q) 1 Sch. & Lef. 408.

(r) 1 Ves. sen. 19.

(s) 1 Ves. & B. 30.

(t) 1 Dow. 177.

(u) 1 Atk. 2.

(v) 1 Sch. & Lef. 281.

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was proceeding upon the mode of raising money to satisfy charges and provide an outfit for Richard Bacon Frank ; and also respecting the resettlement of the Norfolk and Suffolk estates of Edward Frank ; but this last discussion or negotiation does not appear to have been carried on with a view, to supersede or provide a substitute for the arrangement, in pursuance of which the decree of May, 1831, was made. It was attempted to carry the object of both the arrangements into effect, but whilst the hearing of the petition to confirm the Master's report was postponed, and proceedings in Parliament, in pursuance of the orders of the 12th of May and 15th of June, were pending, Richard Bacon Frank died, and both arrangements were left imperfect. Richard Bacon Frank, the then tenant in remainder, had not done the acts required to bar the entail, and the question is reduced to this, whether the decree, directing the owner of a legal estate tail to do such acts as are requisite to bar the estate tail, is so far binding on the issue in tail, that although the acts are not done, he is precluded from asserting his right.

*In the case of *The Attorney General v. Day*, (a) Lord Hardwicke [*126] stated, that it had been determined, that on a bill to carry into execution a contract for the purchase of lands in the life of the tenant in tail, the court would decree him to execute and to suffer a recovery. But if he will not, the court cannot carry it into execution against the issue in tail claiming paramount "*per formam doni*." The utmost that can be said of this case is, that Richard Bacon Frank had agreed to confirm the acts of his father, and had submitted to a decree ordering him to do the required acts on his part, but the acts had not been done when he died, and the issue in tail is not bound ; I am, therefore, of opinion that the plaintiff is not precluded from seeking relief by the acts and obligations of his father, and consequently, that such issues or issue must be directed as may be necessary to ascertain, whether Edward Frank was of sound mind at the respective times when the deeds were executed, (15th April, 1817,) the recoveries suffered, (Easter term, 1817,) the copyholds surrendered, (), and the authority to sell given, (24th August, 1820.)[1]

Mr. Bellamy and his wife had been examined as witnesses on the behalf of the younger children of Mr. Frank the lunatic, and they had been cross-examined on behalf of the plaintiff to verify documents. It was admitted by the

(a) 1 Ves. 224.

[1] An inquisition is only *prima facie* evidence of the fact of lunacy. *L'Amoureux v. Crosby*, 2 Paige, 422. And in the case in the text :—"On the 5th of December, 1840, the issue was tried, and the jury found for the plaintiff in the issue, thereby establishing the sanity of Edward Frank at the time he executed the deeds." See 4 Beav. 37, 39. From a very slight attention to the report of the case in 4 Beav., it is apparent that the word "*plaintiff*," is a mistake ; the verdict must have been for the *defendant*. According to the terms of the order directing the issue the *onus* of proving that Frank was not of sound mind was thrown upon the plaintiff ; and having failed at the trial, the bill was dismissed, the plaintiff to pay both the costs of the bill and of the issue.

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plaintiff that the trustees had been guilty of no fraud in its odious sense, and had not in any way acted for their personal advantage, and it was conceded by the defendants that the trustees had received some very [*127] small sums of money, for the purchase of part of the property by a railway company. These depositions, however, of Mr. and Mrs. Bellamy being offered in evidence,

Mr. *Pemberton* objected to their admissibility, on the ground that Mr. Bellamy was interested in the result of the suit, and that his wife could not be examined in support of her husband's interest. He contended that, in equity, an objection to the competency of a witness was not waived by cross-examination; *Moorhouse v. De Passou*, (a) *Harrison v. Courtauld*. (b)

Mr. *Kindersley* and Mr. *Koe*, contra, contended that the witness, being a mere trustee, had no such interest as disqualified him from giving evidence in support of the case of the younger children; and secondly, that the objection had been waived by the cross-examination with notice of his interest.

THE MASTER OF THE ROLLS :—I think I am bound to reject this evidence. The first question is, whether these witnesses are interested; and I think it cannot justly be said that persons against whom it is prayed that deeds arising out of a transaction like the present may be set aside, have not an interest in this suit: they are clearly interested in rebutting the charge which has been made against them, and in opposing the relief which is now prayed. It is also to be considered that they are chargeable to the plaintiff, if he succeeds, for the purchase money, however small. [1] As to the cross-examination of the witness, I should hesitate in concurring in the doctrine, that a witness may be cross-examined to any extent and for [*128] any purpose, without waiving the objection to his competency on the ground of interest. I do not however think, that ordinarily speaking a mere cross-examination is to be considered as amounting to a waiver of the objection, when the party does not know whether the witness is interested or not. The argument used on the part of those tendering the evidence, is consistent with itself. First, it is said that these defendants are not concerned in the question in point of interest, but then it is further said that, even if such should not be the case, yet, under the circumstances appearing on the record, the objection is waived; I think however that the latter argument cannot prevail any more than the other, and I am consequently under the necessity of rejecting this evidence. [2]

(a) 19 Ves. 433.

(b) 1 Russ. & Myl. 428.

[1] Vide *Roberts v. Anderson*, 3 Johns. Ch. Rep. 371, 375; *Cook v. Mancius*, 5 Johns. Ch. Rep. 95; *Neilson v. McDonald*, 6 Johns. Ch. Rep. 201; *Eckford v. DeKay* 6 Paige, 565; *Wormald v. Mackintosh*, 5 Myl. & Cr. 5, 9; *Moore v. Hitchcock*, 4 Wend. 297. A defendant charged with fraudulently colluding with his co-defendant, in regard to the transactions sought to be impeached, cannot be a witness for his co-defendant; especially where he has an interest arising from his liability to costs. *Whipple v. Van Rensselaer*, 3 Johns. Ch. Rep. 612. Trustees will not be allowed to be sworn as witnesses to defeat a trust deed. *Wilson v. Wilson*, 1 Dessau. 230.

[2] As to this branch of the decision, see further, 1 Russ. & M. 430 n. 1.

1839.—Collins v. Carey.

With regard to the evidence of Mrs. Bellamy, **THE MASTER OF THE ROLLS** held that the evidence of the husband, though a trustee, being once rejected on the ground of interest, the same objection applied to his wife.[1]

COLLINS v. CAREY.

1839: July 23.

Business relating to a trust estate was transacted by two solicitors in partnership, one of whom was a trustee of the estate: Held, in passing his accounts, that costs out of pocket could alone be allowed.

THE testator, Mr. Collins, appointed a Mr. Vining, a corn merchant, and Mr. Carey, a solicitor, his executors and trustees.*

Mr. Carey carried on business in partnership with Mr. Cross, and business relating to the trust had been done by the partnership.

The usual accounts of the testator's estate were taken in the Master's office, and the question now submitted *to the court was this, [*129] whether the Master ought to have allowed more than costs out of pocket for the business so done by the partnership.

Mr. C. P. Cooper, for Mr. Carey, submitted that this case differed from *New v. Jones*,(a) and *Moore v. Frowd*,(b) inasmuch as here the business was transacted by a firm, one of the members of which was not a trustee; that he ought not, therefore, be deprived of his share of the costs, on the ground of his partner filling that character.

Mr. Tinney and Mr. James Russell, for the plaintiffs,

And Mr. Blunt and Mr. Walpole, for other parties, were not called on by

THE MASTER OF THE ROLLS, who thought there was no distinction, and disallowed the claim.[2]

LITTLER v. THOMSON.

1839: January 24, 25. February 21. March 25.

Pending proceedings in this court, attacks on the plaintiff and his witnesses were published, representing those proceedings as vexatious, and that the witnesses had in their evidence been guilty of perjury: Held, that this, being calculated to disturb the free course of justice, was a contempt of court.

THE question in this cause was as to the right of a tenant for a term of a nursery-ground to remove therefrom, on quitting the premises, trees and

(a) 9 Jarman's Byth. 338.

(b) 3 Myl. & Cr. 45.

[1] *E converso*, whenever the husband would be a competent witness, the wife may be sworn. *Bell v. Coiel*, 2 Hill's (So. Car.) Rep. 110.

[2] Vide 3 Myl. & Cr. 51, n. 1. *Willis v. Kibble*, 1 Beav. 559. *In re Sherwood*, 3 Beav. 336.

 1839.—*Little v. Thomson.*

hedges which were of very long standing, and exceeding forty years' growth.

On the 8th of November, 1838, the plaintiff obtained an injunction [*130] to restrain the defendant from selling, "cutting down or removing any full-grown or standard timber, fruit, or other trees, or any hedges, on the lands in the bill mentioned, except such trees or shrubs as might or could be removed in the ordinary course of his trade or business as a nurseryman, until answer or order to the contrary. This injunction had been obtained upon the affidavits of the plaintiff and two other persons. Subsequently to this, and pending a motion to dissolve the injunction, various very violent articles appeared in the *Gardiners' Gazette* reflecting on the plaintiff and the witnesses who had made affidavits in support of the injunction, and characterizing the chancery proceedings as vexatious and unprincipled, and representing the affidavits as containing glaring misrepresentations, which the editor believed, and heartily hoped, would lead to an indictment for perjury.

In the course of the motion for dissolving the injunction, these publications were brought to the attention of the court, and it was argued, from some passages contained in them, that they must necessarily have been inserted through the means of the defendant or his agents, as they alone could have furnished the information.

Mr. *Pemberton* and Mr. *Craig*, for the plaintiff.

Mr. *Kindersley* and Mr. *Blenman*, for the defendant.

THE MASTER OF THE ROLLS:—On the merits I have a very strong inclination of opinion, but I do not think it proper for me now to state it, for I consider it necessary before I ultimately decide this case, that I should have from the defendant or his solicitor some answer to the imputation of [*131] the great "offence which he is said to have committed. I must give him an opportunity of so doing, hoping that it will turn out that he has not committed it.

It is of great importance to the defendant to relieve himself from this imputation. If parties in the prosecution of their rights are to be exposed to this species of attack, and are to be placed in such a situation that they cannot safely proceed in the defence of their rights, and if witnesses are in this way to be deterred from coming forward in aid of legal proceedings, it will be impossible that justice can be administered. It would be better that the doors of the courts of justice were at once closed.

The defendant and his solicitor subsequently, by affidavit, denied any participation in the publication complained of.

The attacks on the plaintiff and his witnesses were however still continued in the *Gardener's Gazette*; in a subsequent number the case was represented as a persecution in which the defendant was suffering under the influence of treachery and falsehood; that the prosecution was founded on falsehood, and the whole weight of the case against him was supported by falsehood.

1839.—*Little v. Thompson.*

February 21.—It was now moved, on behalf of the plaintiff, that Mr. Glenny, the editor and proprietor of the *Gardener's Gazette*, might be committed for the contempt.

Mr. Glenny, in answer to this application, made a long affidavit, denying any intention of giving offence to the "court, or of influencing [*132] or obstructing public justice, or prejudicing the case of the plaintiff; and stating that he had acted under the conviction "that he was advancing and promoting the cause of truth and justice," and that he had erred in ignorance, and without any improper motive or intention.

Mr. *Pemberton* and Mr. *Craig*, for the motion, cited *Pool v. Sacheverell*, (a) *Anon.* (b) *Roach v. Garvan*, (c) *Anon.* (d) *Lechmere Charlton's case*, (e) *Greenwood v. Taylor*. (g)

Mr. *Kindersley* and Mr. *O. Anderdon*, contra, confined themselves to reading the affidavit of Mr. Glenny, leaving the whole matter, on that affidavit, to the favorable consideration of the court.

THE MASTER OF THE ROLLS :—I shall not decide this case without first reading with careful attention the affidavit of Mr. Glenny. Whatever might have been his belief at the time he published these articles, that belief will not protect him from the consequences, if his publication has been of such a nature as to disturb the free course of justice. The effect of such publications would seem to be not only to deter persons from coming forward to give evidence on one side, but to induce witnesses to give evidence on the other side alone. What I am to consider is this, whether these papers are or are not calculated to disturb the free course of justice.

***March 25.**—**THE MASTER OF THE ROLLS** :—I have no doubt but [*133] that this publication comes within the cases cited and is a contempt of court. I am surprised that a gentleman of education and science should think that it was serving the cause of truth and justice, or likely to benefit the gardeners, whose interest he professes to advocate, to publish articles of this description pending the progress of a cause. Having regard, however, to the statements contained in the affidavit of Mr. Glenny, and not wishing to visit him with any greater severity than the circumstances require, I think that justice would be satisfied by ordering him to pay all the costs of the proceeding. On his doing this, I shall not be disposed to proceed further in the case. [1]

(a) 1 P. Wms. 675.

(b) 2 Atk. 469.

(c) 2 Dick. 794.

(d) 2 Ves. Sen. 520.

(e) 2 Myl. & Cr. 316.

(g) Before Lord Brougham in 1833.

[1] Vide 2 Myl. & Cr. 361, n. 1.

 1839.—Pritchard v. Foulkes.

PRITCHARD v. FOULKES.

1839: July 6, 19.

A petition for a commission to examine witnesses, and the order thereon, obtained by consent, were intituled in an original and revived suit, but the interrogatories were intituled in the original cause only: Held, that the interrogatories were wrongly intituled, and the depositions were suppressed.

Depositions suppressed on the ground of interrogatories being intituled in one cause, in which a deceased defendant and her representatives were all stated to be defendants together.

THIS was a motion to suppress the depositions of a witness examined in the cause: one of the grounds was that the interrogatories on which the witness was examined were wrongly intituled.

The case was that Elizabeth Eddowes, one of the defendants to the original bill, having died after her answer had been put in, a bill of revivor against her representatives was filed, and an order to revive was obtained and served properly on the defendants to the bill of revivor, and also on the surviving defendants.

[*134] *Some time afterwards a petition for a commission to examine witnesses was presented: this petition was intituled in the original and revived suit; an order for a commission intituled in the same manner was granted by consent, and the commission issued under that order.

At the execution of the commission, interrogatories were produced on the behalf of one of the surviving defendants in the original cause: those interrogatories were intituled in the original cause only. A witness was examined upon them, and the motion sought to suppress those depositions, and also other depositions of the same witness taken in the examiner's office upon interrogatories intituled in the same manner.

The objection taken was, that the interrogatories ought to have been intituled in the original and revived suit in the same manner as the order under which the commission issued.

It was answered, that although one defendant was dead, and an abatement as to her had occurred, there was no abatement as to the surviving defendants, who were the only parties to the original cause, who were in contest with the plaintiffs in that cause only, and being entire strangers to the abatement and revivor, were neither bound nor at liberty to take any notice of the proceedings in respect thereof.

Mr. Pemberton and Mr. James Russell, in support of the motion.

Mr. C. P. Cooper and Mr. Bacon, contra.

[*135] *Curre v. Bowyer,^(a) was cited; and see *Campbell v. Dickens*,^(b) and *Perry v. Silvester*.^(c)

July 19.—THE MASTER OF THE ROLLS, after stating that the order to re-

(a) 3 Swan. 357.

(b) 3 Younge & C. 720.

(c) Jac 83.

 1839.—*Pritchard v. Foulkes*.

vive had been unnecessarily served on the surviving defendants to the original bill, with respect to whom there was no abatement, proceeded.

I have consulted the officers of the court on the subject ; but in consequence of some differences of opinion they have been unable to afford me all the assistance I desired.

It is agreed that an abatement by the death of one defendant does not affect the surviving defendants, who are not proper parties to a bill of revivor and who are only concerned with the plaintiff's proceedings on the abatement, to the extent in which the court, upon a special case, may think that the circumstances attending the same may excuse some delay, and consequently affect the right of the surviving defendants to the original cause to dismiss the bill for want of prosecution. It is agreed also, that if in the present case there had been no order for a commission, and the witness had been examined before the examiner upon interrogatories intituled as these were, the depositions would have been regularly taken ; and there are some who think that, notwithstanding the order for a commission, in which all parties joined, and the double title of that order, the depositions taken upon interrogatories intituled in the original cause only, are regular ; but upon this point, (the only one which is material on the present oc- [*136] casion,) there is very great difference of opinion, and no authority bearing upon the question has been found ; I am therefore under the necessity of being guided by that which appears to me to be the most reasonable and regular course and I think that the defendants having consented to the order of the 19th of July, 1838, which was intituled in the original cause and revived suit, and the commission in which all parties joined having issued under that order, all the proceedings which afterwards took place ought to have been intituled in the same manner, and consequently that the interrogatories were wrongly intituled in the original cause only, and that the depositions ought to be suppressed.

There was a subsequent motion to suppress other depositions, on the ground of the interrogatories being intituled in one cause, in which the deceased defendant and her representatives were all stated to be defendants together.

THE MASTER OF THE ROLLS said, that it appeared to him that this title was clearly irregular, and that the depositions taken on these interrogatories must be suppressed.[1]

[1] Affirmed, 7th Nov. 1840. It is not irregular to intitle a commission to examine witnesses, or the commission or the return thereof, in a short form, as a suit in which "A. and others are plaintiffs." and "B and others, defendants." *Lincoln v. Wright*, 4 Beav. 166. A supplemental bill was filed in which a deceased person was named as co-plaintiff, and as next friend of infant plaintiffs, and in the title of the plaintiff's interrogatories for the examination of witnesses, his name was mentioned as being still a party ; it was held that a defendant who had acquiesced and intituled his interrogatories in a similar manner, could not, after publication, move to suppress the depositions. *Ibid*. In the case just cited, the Master of the Rolls, in regard to his decision in the case in the text, observed, "that

1839.—Peck v. Cardwell.

[*137]

*PECK v. CARDWELL.

1839 : April 20, 22, 23, 30.

Four persons purchased some land and agreed that it should be laid out in streets, and sold in lots according to a specified plan. All the parties died : and there being no equitable ground for putting an end to the agreement : Held, that the representatives of one of the parties could not maintain a suit for a partition against the representatives of the others.

A., B., C. and D. purchased land on a joint speculation ; and they agreed, in case either of them should sell his share, to give to the others the option of buying. A. and B. paid the whole purchase money, and C. and D. mortgaged their shares to A. and B. to secure their proportions. D. died, and made A., C. and W. executors and trustees, and gave them power to sell but no power to make purchases. A. and B., who alone proved the will, together with W. agreed to relinquish to C. a proportion of the estate, in consideration of C.'s releasing to them his share in the residue, subject to his mortgage debt thereon. W. died, and A. and B. afterwards completed the contract : Held, that as there was no power given to the executors and trustees of D. to purchase, or to render the testator's estate liable to a portion of C.'s mortgage, the estate of D. was not entitled to participate in the benefit of the purchase.

IN 1791, John Singleton, John Hodgson, Richard Cardwell and Henry Helme, all of whom were since dead, became the purchasers of some property.

there was a considerable difference of opinion among the officers of the court as to the correct mode of intituling these matters ; and that in the case of *Pritchard v. Foulkes* he had himself been under the necessity of deciding between conflicting opinions as to the practice." A commission to examine witnesses, and the depositions taken thereunder, were intituled in an original and revived suit, but the interrogatories were intituled as in a single suit, though in a manner applicable either to the original suit, or to the suit as revived : it was held that the interrogatories were not wrongly intituled, and a motion to suppress them was refused. *Jones v. Smith*, 2 Yo. & Coll. C. C. 42. Knight Bruce, V. C. there said ; " when the case of *Pritchard v. Foulkes* was first cited to me, I understood that the depositions there sought to be suppressed were depositions taken on the part of the plaintiff ; and had it been so, I should have considered the case clear of all difficulty. I allude to the application in *Pritchard v. Foulkes*, first reported in 2 Beavan, not to that mentioned at the foot of page 136 in that volume. As that case was afterwards explained to me, and as it appears in the book, it had some difficulty. It is not necessary or material that I should on the present occasion express or intimate any opinion or doubt that I may entertain, if indeed I have formed any opinion or doubt, as to any branch of it. I apprehend that *Pritchard v. Foulkes* and my present decision may well stand together.—The present case is thus :—Jones was and is the sole plaintiff. The original defendants were Thomas Asheton Smith and the party who moves. T. A. S. having died before any witness had been examined, and before any commission had issued, and, indeed before either defendant had answered, the plaintiff filed a bill of revivor against the present defendant T. A. S., the son and personal representative of the deceased defendant, as his personal representative. Upon this bill, after the present Mr. T. A. S. had put in one answer to both bills admitting assets, the usual order of revivor appears to have been regularly made. The abatement or partial abatement was thus cured, and the cause again regularly and sufficiently constituted in point of parties. This having been done, the commission regularly issued.—It seems to me that, admitting the title of the commission to be correct, the title of the interrogatories is not incorrect in describing them as being in a single cause ; that cause being constituted of Jones as plaintiff against T. A. Smith and Turner as the defendants. I apprehend that there are not two causes, and that the suit is one original cause which, after an abatement or a partial abatement, has been and stands revived ; the plaintiff having remained throughout unchanged, the present Mr. Smith being by a proceeding merely of revivor, substituted for his deceased father whom he represents, and there having been no other alteration or addition. It is true that there are two bills. But if the case is single, why should it be held necessary to mention the plurality of bills in the title of the

1839.—Peck v. Cardwell.

in the neighborhood of Liverpool, called the Hedge Hill estate, for the sum of 7350*l*. The purchase money was advanced by Hodgson and Cardwell alone. On the 11th of February, 1791, the property was conveyed to the purchasers, and on the 19th of March following, Helme and Singleton mortgaged their shares to Hodgson and Cardwell, to secure to them their proportions of the purchase money which had been paid for them by Hodgson and Cardwell.

On the same day the parties executed an agreement, regulating the mode in which the land was to be laid out for building upon, and for selling the same in lots, from time to time, for their mutual benefit; and it was agreed, that if either party or his heirs should be desirous of selling his share, it should be first offered to the other parties at a price to be fixed by the vendor; and if refused by the others, then it might be sold to any other person, to be first approved of by the rest; and if such purchaser should be refused or rejected by the rest, then the share was to be valued by arbitration; and if the "other partners refused to purchase at that valuation, then the party [*138] selling was to be at liberty to dispose of his share by public auction to the highest bidder.

Singleton, by his will, appointed Cardwell and Helme and a Mr. Edward Whiteside his executors and trustees, and devised to them his one-fourth share of the property on certain trusts; he gave them power to concur with the other parties interested in the property in opening streets, in selling, conveying, or making partition of the property, and power to sell any share which might be allotted to his estate in severalty.

Singleton died in 1793, his share being still subject to the mortgage to Hodgson and Cardwell. Cardwell and Helme proved his will. Edward Whiteside, who was tenant for life of Singleton's property, though he did not prove the will, seemed to have acted with Hodgson and Cardwell in the management of the property. Helme became desirous of retiring from the concern, and on the 6th of June, 1798, an arrangement was entered into, by which Hodgson, Cardwell and Whiteside, described as partners, agreed to relinquish to Helme one acre and a quarter of the land absolutely, on his giving up all claim whatever to the remainder of the estate subject to his mortgage debt, which, it was alleged, was considered to be the value of the share so released. Edward Whiteside, the tenant for life under the will of Singleton, died in

interrogatories? That title seems to me substantially to agree with the state of the cause, and not substantially to differ from the title used in the commission. We are not now dealing with the case of an abatement by the death of a plaintiff or the marriage of a female plaintiff; especially not with a case where upon the death of a plaintiff, his interests in the subject of suit sever and vest in different persons; nor are we dealing with the case of revivor after decree. We are dealing with a most simple and common case of revivor on the death of a defendant before the hearing—before any examination of witnesses—before any commission—and before answer; to different considerations from which the other cases to which I have just alluded, [*Catton v. Lord Carlisle*, 5 Mad. 427. *Prusen v. Lussu*, 5 Russ. 3,] may or may not be open. On the whole, I think it right to refuse this application. But in doing so my mind is not free from doubt, &c."

 1839.—Peck v. Cardwell.

July, 1798, and thereupon the plaintiffs, who were then infants, became beneficially interested in Singleton's estate. After the death of Whiteside the one acre and a quarter of the partnership land was conveyed to Helme, and one-fourth of the value was carried to the separate account of the estate of Singleton, free from any charge, and at the same time Cardwell and Hodgson took to themselves Helme's interest in the remainder of the estate. By this bill the plaintiffs insisted, that on the retirement of Helme from the partnership, the parties interested under the will of Singleton had a right to participate in the benefit of the purchase of Helme's share; they prayed for consequential accounts, and for a partition of the estate; they contended, that as the representatives of Singleton were entitled to the benefit of the option of purchasing Helme's share, and as the purchase had been made by persons, including Whiteside, who stood in the situation of partners as well as of executors and trustees, the estate of Singleton, was entitled to the benefit of the contract.

Mr. *Kindersley*, Mr. *G. Richards* and Mr. *Booth* for the plaintiffs.

Mr. *Pemberton* and Mr. *James Parker*, for the principal defendant.

Mr. *Parry* and Mr. *S. Sharpe*, for other defendants.

THE MASTER OF THE ROLLS reserved his judgment.

April 30.—THE MASTER OF THE ROLLS—In the year 1798, the piece of land which is in question in this cause was vested, in equal fourth parts, in Richard Cardwell, John Hodgson, Henry Helme and the trustees of John Singleton's will; the trustees were Richard Cardwell, Henry Helme and Edward Whiteside. The estate was held subject to the agreement of the 19th of March, 1791, the shares of Helme and the share vested in the trustees of Singleton were subject to mortgages to Cardwell and Hodgson for the amounts of their shares of the purchase money; and the will of Singleton devised his share to his trustees, on trusts which enabled them to concur with the other persons, *i. e.* with themselves Cardwell and Helme, and with Hodgson, or those claiming under them, in opening streets, in selling and conveying the property, and in making partition, and selling any share which might be allotted to the estate of Singleton in severalty. It does not appear to me that these parties can be considered merely as tenants in common of land, as to portions of which some of them were entitled partly as trustees and partly for their own benefit, or that they can be considered merely as partners in a trading concern, which the survivors were carrying on for the benefit of themselves, and of the estate of the one who was dead. They were tenants in common of the land subject to particular agreements, and they were partners subject to the agreement of March, 1791, and also subject, as to Cardwell and Helme, with respect to the share of Singleton, to their duties and responsibilities as trustees and executors of Singleton's will; and moreover Cardwell and Hodgson were mortgagees entitled to demand payment of what was due to them from Helme and the estate of Singleton.

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It seems that Whiteside, one of the executors and trustees of Singleton, and beneficially entitled to his residuary estate for life, was in some sense considered as a partner with Cardwell, Hodgson and Helme; and on the 6th of June, 1798, Cardwell, Hodgson and Whiteside, described as partners, agreed to relinquish an acre and a quarter of the land to Helme, on his paying the balance due from him to them and interest thereon, and giving up all claim whatever to the estate.

All parties to the transaction having long since died, we have nothing beyond the instrument itself, and our knowledge, necessarily imperfect, of the circumstances of the parties to explain what their meaning was.

*The provision that Helme was to give up his claim to the rest of [*141] the estate, in consideration of receiving in severalty a portion of that which was partnership property, leads to the inference that that which he was to give up was to be given up for the benefit of the remaining partners; and the terms of the agreement would lead to the inference, that Cardwell and Hodgson, two of the original partners, and Whiteside as representing the estate of Singleton, were to be considered as the remaining partners after the retirement of Helme; and it is upon this that the plaintiffs found their title to relief, for they say, that by the agreement of the 6th of June, 1798, the estate of Singleton acquired, and could not afterwards be deprived of, an absolute interest in that which Helme agreed to give up.

But other questions must unavoidably be considered. The share of Helme was charged with a mortgage debt of 1837*l.* 10*s.* in favor of Cardwell and Hodgson, who were entitled to claim immediate payment, and if necessary, to take immediate steps to foreclose the mortgage; they were not bound, and it does not appear that they agreed in any way to give up this advantage. Cardwell, though one of the executors of Singleton, was entitled to obtain payment of the debt due from the estate of Singleton on the mortgage of his share of the estate. He was under no obligation to qualify or suspend his claim to recover the debt due on Helme's share for the benefit of Singleton's estate, and he was without authority to subject Singleton's estate to any risk or liability whatever, in consideration of acquiring for it a larger interest in the partnership property.

We do not know what course would have been pursued if Mr. Whiteside had lived,—what he might have been disposed to do to satisfy the mortgage claims of *Cardwell and Hodgson,—what responsibilities [*142] he might have been disposed to incur for the benefit of his family, or how far Cardwell and Helme might have been disposed to rely on him to secure themselves against any responsibilities of their own, for Mr. Whiteside died almost immediately after the date of the agreement, and before any thing was done to carry it into execution; and then arose the question, what Cardwell, Hodgson and Helme, as surviving partners, and Cardwell and Helme, as surviving trustees of Singleton, were to do. In fact, they conveyed to Helme one acre and a quarter of the partnership land, and carried to the se-

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parate account one-fourth part of the value free from any charge, and at the same time Cardwell and Hodgson took to themselves Helme's interest in the remainder of the estate; the effect of which was, that the estate of Singleton obtained one-fourth part of the value of one acre and a quarter of land, just as if it had been sold to any stranger, and continued entitled to one-fourth of the residue of the property, subject only to the mortgage debt which Singleton himself had created.

The argument of the plaintiff is, that by the agreement of June, 1798, the estate of Singleton had actually acquired a right to participate in any benefit that could in any way be derived from the purchase of Helme's interest or equity of redemption in so much of the property as remained in partnership; and that by the subsequent transaction, the whole benefit of Singleton's estate was cut down to one-fourth part of the value of that part of the partnership property which was conveyed to Helme; and that Cardwell and Hodgson obtained for themselves the whole of Helme's interest, or in other words, that Cardwell, Hodgson and Helme (Cardwell and Helme being both surviving partners, and also trustees of Singleton's estate,) concurred in [*143] appropriating to *Cardwell and Hodgson that share of Helme's equity of redemption to which the estate of Singleton had previously become entitled; and I think that the argument would have been of great weight, if there had been authority to make Singleton's estate liable to additional debt in order to obtain an enlarged interest in the partnership, and if Cardwell and Hodgson had come under any obligation to forbear from demanding payment of the debt charged on Helme's share; but seeing no reason to think that Singleton's estate became entitled to any interest in Helme's share without paying, or becoming liable to pay one-third of Helme's mortgage debt; and there being no authority to make Singleton's estate liable to pay any part of the mortgage the argument appears to me to fail. If this were a purchase by the trustees of the trust property it would not be supported, either by the fairness of the transaction, or by the communications made to the friends of the infant *cestuis que trust*; but considering it, as it is, a partnership transaction, in which the interest of a deceased partner was affected by the restricted powers contained in the will of the deceased partner, and conceiving that it would have been a breach of trust to subject the assets of Singleton to any additional risk in the expectation of deriving an additional profit from the enlarged share in the partnership property, and that Cardwell and Hodgson were not bound to forego their own claim to payment, I do not think that the plaintiffs are entitled to the benefit they now seek. Being of this opinion, it is not necessary to detail minutely the effect of the long correspondence which has been proved. I see no reason to think that there was any intention to conceal any part of the transaction; but I have some doubt whether there is sufficient proof that the full particulars of the whole transaction were communicated in a manner and under circumstances to [*144] make it perfectly clear, that the *cestuis que trust* *knew every thing

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required to enable them to determine whether they would or not confirm the transaction, if it had been a transaction the validity of which depended on their confirmation.

As the accuracy of the accounts which have been rendered is not disputed, otherwise than as those accounts have not given to the plaintiffs any thing in respect of the share which is claimed by the bill, the only question which remains is, whether the plaintiffs are entitled to a partition, and to have their fourth of the remaining partnership lands allotted to them in severalty, and I am of opinion that consistently with the agreement of 1791 there cannot be a partition. It is evident that, according to that agreement, the parties thereto and those claiming under them, were to hold the land remaining unsold together, for the purpose of selling the same in lots for building, according to a certain plan. The bill does not allege any equitable ground for putting an end to the agreement, but claims partition as a right. It seems, however, so unlikely that the interest of either party can be promoted by the continuance of the partnership, that I should be glad, if upon consideration some arrangement could be made for separating their interests and securing to each what he is entitled to, without varying from that plan which seems to have been adopted.

If no arrangement can be made, I think that the bill must be dismissed.[1]

*CURSHAM v. NEWLAND.

[*145]

1839: November, 26.

The words "lawful issue" in a devise to four parents and their "lawful issue respectively in tail general" with benefit of survivorship to and amongst their issue respectively, as tenants in common, held, upon the context of a will, to be words of purchase, and not of limitation.

The testator devised his residuary freehold, copyhold and leasehold estates to his son and four daughters "and their lawful issue respectively in tail general, with benefit of survivorship to and amongst their issue respectively, as tenants in common;" but such issue "being sons," not to have vested interests until they attained twenty-one, or "being daughters," until twenty-one or marriage; with power to the trustees, after the death of his son or daughters respectively, to advance such issue during minority, to the extent of one half the presumptive share of "each *et id*;" and in case his son or daughters or any or either of them should die without leaving lawful issue, or with lawful issue, and such issue, being a son or sons, should not attain twenty-one, or being a daughter or daughters, should not attain that age or be married, then the part or share of him or her so dying to be for the benefit of the survivors and their issue, in the same manner as their original shares: Held that the testator's children took estates for life, as tenants in common, in the freeholds and copyholds, with remainder to the grandchildren, in tail general, in the shares of

[1] As to partnership in real estate, see *Fereday v. Wightwick*, 1 Russ. & M. 49, and n. 1, *ibid*. *Randall v. Randall*, 7 Sim 271. 1 Story's Equity, § 674. Story on Part. § 92, 93. Where land is taken by the agent of a partnership, in his own name, as security for, or in payment of a debt to the partnership, it is considered, on the principle of conversion, as partnership property, and the right to enforce the trust survives to the surviving partner. *Anstice v. Brown*, 6 Paige, 448.

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their respective parents, with cross-remainders in tail between such grandchildren respectively, and with remainder for life to the survivors or survivor, others or other of the parents, in equal shares for life, with remainder in tail to their children; the shares accruing to such survivors, &c., to be subject to the same limitations and such benefit of survivorship as the original shares.

THE will of the testator, Richard Merricks, dated in 1821, contained the following residuary clause:—"I give, devise and bequeath all the rest of my freehold, copyhold and leasehold estates, with all my household goods, plate, linen, china and all other my real and personal estates, with their appurtenances, according to the nature and quality of such estates respectively, to my dear wife, Elizabeth Merricks, for her own absolute use and benefit, for and during the term of her natural life; and from and immediately after her decease, unto my said son and daughters, Richard Merricks and Elizabeth the wife of the said George Buckton, Louisa Merricks, Susanna Woodyer Merricks and Harriet Merricks, *and their lawful issue respectively, in tail general, with benefit of survivorship to and amongst their issue respectively, as tenants in common*, and not as joint tenants; provided always that such *issue* not to have a *vested interest* until they attain the age of twenty-one

years, *being sons, and being daughters* until they shall attain [*146] *that age or be married*: but during the minority of the said *issue* of my said son and daughters respectively, I do hereby authorize my said trustees, or the survivors or survivor of them, or the heirs of such survivor, after the death of either my said son or daughters respectively, to apply the whole or any part of the rents, issues and profits of the said estates, and not exceeding the interest of the presumptive share of each *child* therein, for and towards his, her or their maintenance, education and advancement in life during minority; and in case my said son and daughters or any or either of them shall die in my lifetime or after my decease, without leaving lawful issue, or with lawful issue, and such *issue* being *a son or sons* shall not live to attain the age of twenty-one years, or being a daughter or daughters shall not live to attain that age or be married, then the part or share or parts or shares of him, her or them so dying, to be for the benefit of the *survivors* and their issue, in the same manner as their original parts and shares are hereinbefore given to them respectively as aforesaid."

In a former part of his will the testator had devised an estate to his two nephews respectively, during their lives and the life of the longest liver, with remainder to trustees to preserve contingent remainders; "and after the decease of his said nephews or the survivor of them, to the use of all and every *the lawful children* of his nephews and their heirs and assigns for ever, "as tenants in common," with a gift over in the event of there *being no such child*, or there being children of his nephews or an only child, they should die in the lifetime of his nephews or the survivor of them without leaving lawful *issue*.

[*147] "The testator had also in a previous clause directed a sum of 4000*l.* to be invested in trust for his son Richard Merricks for life, with remainder to Richard Merricks' wife for life, with remainder amongst the

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children of Richard Merricks who should live to attain twenty-one being a son, or being a daughter should attain that age or marry with consent; "but in case his son Richard Merricks should die without leaving *lawful issue*, or leaving *lawful issue, such issue being a son* should not live to attain twenty-one, or being a daughter should not attain that age or be married as aforesaid," then immediately after the death of his said son and wife, to divide the fund between the testator's four daughters who should be then living, or the *lawful issue* of such of them as should be then dead, *such issue* taking the part or share which their, his or her mother would have been entitled to had she been then living, to be equally divided amongst the children of such of his daughters who should be then dead; and if neither of the testator's said daughters should be living at the decease of his son Richard Merricks and wife *without leaving lawful issue as aforesaid*, then he directed the fund to be divided equally between all his grandchildren, being children of his aforesaid daughters.

The testator died in 1822.

The case had been originally sent by this court for the opinion of the Court of Common Pleas on this question: "What estates the children of Richard Merricks the testator took in the freehold, copyhold and leasehold lands respectively; and whether the grandchildren took by purchase any and what estates in the same lands respectively, or any of them."

*The Judges of the Common Pleas certified that the children of the [*148] testator took estates for their respective lives, as tenants in common, in the freehold and copyhold lands devised by the residuary clause of the will, and the grandchildren contingent remainders, in tail general, by purchase, in the shares of their respective parents in the same lands, with cross-remainders in tail among such grandchildren respectively, *and cross-remainders in tail among their parents*; the testator having in the opinion of the Court of Common Pleas used the words "issue of child or children" as synonymous with "sons or daughters of a child or children," and that the children and grandchildren respectively took corresponding interests in the leaseholds.(a)

The case coming before this court upon the certificate of the Court of Common Pleas, it was contended, on behalf of the defendants, that the respective children of the testator took estates for life, and that their children took estates tail in the respective shares of their own parents, with cross-remainders between them; but that if any one of the parents died without leaving children, then that his or her share went to the *other* children of the testator, as tenants in common, *for life*, with remainder to their children, in the same way as their original shares; and that the word "survivors" must be read "others or other."

It being admitted, on the part of the plaintiff, that there was considerable

(a) 2 Bing. N. C. 58; and 2 Scott, 105.

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difficulty in maintaining the certificate of the Common Pleas in this respect, the case was referred, in similar terms, for the opinion of the Judges of the Court of Exchequer, who, on the 5th of June, 1838, certified as [*149] follows:—"We have heard this case *argued by counsel and considered it, and we are of opinion that the testator's son and daughters took estates for their respective lives, in remainder, after the death of the testator's widow, as tenants in common, in the freehold and copyhold lands devised by the residuary clause, with contingent remainders in their respective shares to their respective children by purchase, as tenants in common in tail, with cross-remainders in tail between such children in each respective share, with cross-remainders over in the whole of each of such shares respectively, on failures of all the children of any one son or daughter and their issue, *to the survivors or survivor* of the testator's sons or daughters for life, remainder in tail general to the children of such surviving son or daughter respectively, in like manner as in the original share given to such son or daughters respectively; and that the son and daughters and their children respectively took corresponding interests in the leaseholds by way of executory bequest." (a)

The case now came before the Master of the Rolls upon this certificate, which, without argument, was confirmed with this addition, that it was admitted by counsel on both sides, and allowed by the court, that the word "survivors" was to be constructed as "others," and that the accruing shares were to be subject to the same limitations over as the original shares. (b) [1]

Mr. Pemberton and Mr. Bird, for the plaintiffs.

Mr. Tinney and Mr. Teed, for the defendants.

[1] Vide *Slade v. Parr*, 1 Ya. & Coll. C. C. 565, 568, n. a.

(a) 4 Mee. & W. 101.

(b) Extract from Decree:—

Declare, that according to the intention of the said testator and the true construction of his will, the said plaintiffs and the defendants Richard Merricks and Elizabeth Buckton, the five children of the said testator, became entitled under such will, upon the death of the said testator's widow, Elizabeth Merricks, in the pleadings named to all the residuary freehold and copyhold estates of the said testator devised by his said will, for their respective lives, in equal shares, each taking an estate in one-fifth thereof for his or her life; with remainder as to such one-fifth, to his or her children, if more than one, as tenants in common in tail, with cross-remainders between or among such children in tail; and if but one, to such only child in tail; with remainder after the failure or determination of such estates tail, as to each fifth, to the survivors or survivor and others or other of the said five children of the said testator, in equal shares, such accruing share of each such survivor and other to be subject to the like limitations over expectant on the life estate of each such child, and also expectant on the failure or issue of each such child as his or her original fifth share, and the like estates and limitations over to extend to all shares surviving or accruing to any child of the testator, or the issue of any such child respectively, as hereinbefore declared as to the original fifth shares. And declare, that the said plaintiffs and defendants, the five children of the said testator, became entitled, on the death of the said testator's said widow, to the residuary leasehold and personal estate of the said testator, in equal fifth shares, for life, and that upon the death of each of the said children of the said testator, his or her one-fifth share of the said residuary leasehold and personal estate will belong to such of his or her child or children, as being sons shall attain the age of twenty-one years, or being daughters shall attain that age or marry, as tenants in common, if

1839.—The Attorney General v. The Fishmongers' Company.

*THE ATTORNEY GENERAL v. THE FISHMONGERS' COMPANY. [*151]
(KNESEWORTH'S CHARITY.)

1839: January 18, 19, 21, 22, 23, November 9.

Establishments or foundations for securing prayers for the souls of the dead are deemed to be superstitious, and within the statute of 1 Edw. 6, c. 14.

The court without deciding whether directions to pray for the souls of the dead were or not unlawful, or prohibited by the Church of England, held, that it might be properly deemed superstitious to create an establishment, or endow a foundation, to be continued in perpetuity and conducted with certain ceremonies supposed to be religious, for the purpose of securing the perpetual continuance of prayers for the souls of the dead, either alone or in connection with other observances within the express terms of the 1 Edw. 6, c. 14.

A testator, who died in the year 1539, devised lands in the city of London to the Fishmongers' Company, to the intent that they should perform his will in manner after declared. He then provided for *obits* and anniversaries, without limiting any term within which the expenses thereof should be confined, and he willed that the company should provide four honest priests, studying in the universities, to pray for his soul there, paying to every of them 4*l.*, quarterly; he next directed the company to provide thirteen poor men and women, being in poverty, to pray specially for his soul, &c., and he provided for a perpetual succession of such poor persons, and he directed the company to pay them 8*d.* weekly, and the poor persons were to attend the anniversaries or *obits*, and he made other similar bequests. The statute of 1 Ed. 6, c. 1, afterwards passed, and the Crown subsequently, for valuable consideration, by letters patent granted to trustees of the company a rent of 53*s.* 4*d.* a year issuing out of the lands, being the annual rent lately payable in respect of the testator's two anniversaries, (without mentioning any other rents.) By a subsequent statute of 4 Jac. 1., all the lands, &c., mentioned in the letters patent of Edward VI were secured, as against the king and his successors, to the companies, saving the rights of any person other than the king: Held, that the bequests to pray for souls were superstitious under the statute of 1 Ed. 6, and that under the letters patent and act of parliament the company were entitled beneficially discharged of any trust.

THE object of this information was to have it declared that certain lands, devised to the Fishmongers' Company by the will of Sir Thomas Kneseworth, became and were now vested in the defendants upon and subject to the charitable trusts and purposes expressed by the same will, and that such trusts and purposes might be carried into effect under the directions of this court.

The lands in question belonged to Sir Thomas Kneseworth, whose will was dated the 13th day of April, 1513, *being in the fourth year [*152] of the reign of King Henry VIII.

By that will, after describing the lands, tenements and property of which he was seised, he gave and bequeathed the same to the warden and commonalty of the Fishmongers' Company, and to their successors, to the intent that they and their successors should keep, fulfil and perform his will and intent, and every article thereof, in manner and form as thereafter was declared and specified. His first direction was, that part of the revenues should be applied

more than one, in equal shares; and that upon failure of such child or children as last aforesaid, such share will go over to the survivors or survivor and others or other of the said testator's five children, in equal shares, the share accruing to each such survivor and other to be subject to the same trusts and limitations over as the original shares, and such benefit of survivorship and accruer to extend to shares which have survived or accrued as well as to original shares.

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in repairing and, if required, rebuilding the premises, so and in such manner that the rents thereof should extend to so much money as should amount to the performance, payments and contentation of his legacies and bequests thereafter ensuing.

And after giving directions for *obits* and anniversaries, with various superstitious ceremonies attending the same, and without having limited any particular term within which the whole expense of the *obits* and anniversaries were to be confined, the testator proceeded to other directions and willed that the company should provide four honest priests studying in art or in divinity in the universities, *to sing and pray there for ever specially for his soul*, the soul of his wife, the souls of his father and mother, and of their benefactors, and all christian souls, paying to every of the said priests, for their salaries, 4*l.* by equal quarterly payments; and he gave directions for maintaining a perpetual succession of such priests, and for securing the payment of their salaries. He next directed the company to provide thirteen poor honest men and women, being of good fame and in poverty, *to pray specially for his soul*, and his wife's soul, and the souls aforesaid, and all christian [*153] souls; *and he provided for a perpetual succession of such poor persons, and directed the company to pay every of them weekly the sum of 8*d.* and deliver to every of them yearly a certain quantity of cloth; and the poor persons were to be required to pray daily, and to attend to the anniversaries or *obits*.

After having thus provided prayers for the souls of those he mentioned, by four priests and thirteen poor men and women, he directed the company to pay to the prior and convent of Royston (Royston) every year 4*l.*, by equal quarterly payments, on condition that the prior and convent there should find a priest to say mass in his church there every day, and the bell was to be rung; the priest was to have 3*l.*, part of the 4*l.* given to the prior and convent, *and was to pray for Thomas Kneseworth's soul* at the altar, and to say *ae profundis* for his soul and all christian souls; and the bell-ringer, for ringing the bell and assisting the priest, and was to have a noble, and the prior and convent were to have the remaining two nobles, for performing the other ceremonies thereby directed.

The next direction in the will was for the payment yearly to Newgate and Ludgate of 40*s.*, at the discretion of the wardens of the company, in such things as the prisoners there should have most need of.

The testator next directed the company to appoint a receiver of the rents, to oversee the repairs and buildings, and out of the rents to pay for the reparations and other charges, and to keep accounts; and the Chamberlain of London was to attend the taking of the account, and to receive 3*s.* 4*d.*; and on the occasion a breakfast was to be provided at the expense of 13*s.* 4*d.*; and the receiver was to have 40*s.* a year; and if the account was [*154] not yearly made, the wardens were to forfeit "in the *name of a fine

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and pain for the default" 10 marks, to be levied of the rents of the devised estates, to the use of the city of London.

The testator then directed that all the rents above the charges and outgoings should be laid in a chest in the treasury house of the company, to the intent that the lands and messuages should be repaired and new builded when need should be. He then directed that his executors should pay 100 marks to be kept in the treasury house, to the intent that the premises might be the better and truly performed, observed and kept. And he willed that every honest man of the company who would borrow 20 marks, or 10*l.*, of the same 100 marks, and of the money remaining of the rents for a half year's space, and lay a sufficient pledge into the treasury for the repayment thereof, and also say *five paternosters and five aves and a crede for the testator's soul* and the souls above said, should have delivered unto him by the wardens 20 marks, or 10*l.* And upon repayment the same money might be re-lent, the party borrowing always saying at the time *de profundis, or five paternosters, and five aves and a crede for the testator's soul* and the souls above said. And in case the company of Fishmongers should make default in performing the trusts or any of them, the testator declared the gifts void, and gave the estates over to the city of London, to the intent that the trusts might be performed by them, except the lending any money, and except that the Fishmongers should have no profit of the aforesaid lands, &c., but by the discretion of the mayor and aldermen of the city.

The testator died in 1529, and the statute of the 1 Ed. 6, c. 14, afterwards passed, by which it was enacted, (a) that "the King should [*155] have and enjoy for ever all lands which by any assurance, will, devise or otherwise, at any time theretofore made, were given or to be employed wholly "to the finding or maintenance of any anniversary or *obit* or other like thing, intent or purpose, or of any light or lamp in any church or chapel, to have continuance for ever, which had been kept or maintained within five years next before the first day of that parliament;" and also, (b) that where but part of the issues or revenues of any lands or hereditaments had been given or appointed to be bestowed or employed "to the finding or maintenance of any anniversary or *obit* or other like thing, intent or purpose, or of any light or lamp in any church or chapel, to have continuance for ever," that then the King should for ever have and enjoy every such sums of money that in any one year within the five years next before the first day of that parliament had been expended and bestowed, about the finding or maintenance of any such anniversary or *obit* or other like thing, intent or purpose, of any light or lamp, to him, his heirs and successors for ever, as a rent charge to be paid yearly, with power of distress and entry for default of payment.

After the passing of the statute of Edward VI. questions arose as to the

(a) Sect. 5.

(b) Sect. 6.

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effect of it in particular cases: when gifts had been made to superstitious uses, it was often doubted whether the statute vested the land itself, or only particular annual payments as rent charges in the crown.

An arrangement took place between the Crown and the Fishmongers and the other companies of the city who were in similar circumstances, for the purchase, by the companies, of the rent charges to which the Crown [*156] had or was supposed to have become entitled, for the sum of 18,744*l.*

11*s.* 2*d.*, and Augustine Hinde, Richard Turke and William Blackwell were appointed to carry that arrangement into effect; and by letters patent dated the 14th of July, 4th Edward VI., in consideration of the same sum of 18,744*l.* 11*s.* 2*d.* paid to the treasurer of the Court of Augmentations by Hinde, Turke and Blackwell, the King granted to them various rents, annuities and yearly sums issuing out of the lands belonging to several companies of the city of London, and amongst other companies, the warden and commonalty of the mystery of Fishmongers; amongst the rents, annuities and yearly sums issuing out of the lands and hereditaments of the Fishmongers' company were the following, viz., *all that one rent, annuity or yearly sum of 53*s.* 4*d.* by the year* issuing out of the two quays called Crown Quay and Greenberry's Quay, and out of nineteen messuages or tenements of the same wardens and commonalty, situate and being within the parish of St. Dunstan in the East, London, and out of four tenements of the same warden and commonalty, situate and being within the parish of St. Margaret, Bridge Street, London, *which same yearly sum, rent or annuity the same warden and commonalty had then lately paid and yearly been accustomed to pay towards the perpetual support of two anniversaries in the chapel called*

, London, for the soul of Sir Thomas Kneseworth, Knight, late alderman of the city of London deceased; and *all that one rent, annuity or yearly sum of 12*s.* by the year,* issuing out of the same messuages and the quay called the Crown Quay aforesaid, in the parish of St. Dunstan in the East, London, *which same yearly sum, rent or annuity the same wardens and commonalty had then lately paid and yearly been accustomed to pay to the late prioress of* [*157] *the late "monastery of Kilburne";(a) and all that one rent, annuity or yearly sum of 10*s.* by the year* issuing out of the same messuages and quay in the aforesaid parish of St. Dunstan in the East, London, *which same yearly sum, rent or annuity the same wardens and commonalty had then lately paid and yearly been accustomed to pay to the late prior of the late monastery of Merton, in the county of Surrey;(a) and all that one rent, annuity or yearly sum of 10*s.* by the year,* issuing out of one messuage of the same wardens and commonalty, situate in Bridge Street, London, *then*

(a) These were, quit rents belonging to the dissolved monasteries and which had vested in the crown under the statute of 26 Hen. 8, c. 28, or the 31 Hen. 8, c. 13, and were unconnected with the bequests in the will of Sir Thomas Kneseworth.

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or then late in the tenure of Simon Mawe, fishmonger, which same yearly sum, rent or annuity the same wardens and commonalty had ther: lately paid and yearly been accustomed to pay to the late abbess of the late monastery of Barking, in the county of Essex; (a) to have, hold, and enjoy all the rents therein mentioned and their appurtenances to the said Hinde, Turke and Blackwell, their heirs and assigns for ever, to their own proper use, without accounts, rent, service or other thing for the same to be rendered, paid or done.

A statute of the 4 Jac. 1, c. 10, (b) afterwards passed, by which it was recited, that in times past, divers messuages and lands were devised, in fee simple, to the use of divers companies in the city of London, who for divers years had enjoyed the same, and employed them to the comfort of many good subjects, and great relief of the poor, and other good and charitable uses; that many of the same devises had theretofore been sought to be avoided, and the lands to be evicted, and *the King to be entitled thereunto, as [*158] concealed or unjustly detained from him; yet his Majesty, taking knowledge of the several compositions made, and great sums of money thereupon paid for the same, both in the time of King Edward VI. and of Queen Elizabeth, and of the good and charitable employment of the said lands, and especially taking knowledge of the letters patent of King Edward VI., dated the 14th day of July, in the 4th year of his reign, whereby, in consideration of 18,744*l.* 11*s.* 2*d.*, the King granted to Augustine Hinde, Richard Turke and William Blackwell and their heirs, divers rents, annuities, pensions and annual profits issuing or employed out of divers messuages and lands of several companies of the city of London therein stated, and, amongst others, of the warden and commonalty of the mystery of the Fishmongers; and that since such grant, questions had been moved, whether the rents mentioned in the grants, or the messuages and lands whereout those rents were mentioned in the same grant to be issuing or employed, were concealed or wrongfully detained from the Crown, and both for the one and the other divers compositions theretofore made: THEREFORE, for the taking away of all doubts and questions, the King, minding that the lands and hereditaments mentioned in the grant should be so assured and established, as that the same should remain and continue to the companies and their successors and assigns, and to their uses, trust and confidence for ever, was pleased that it should be enacted, and it was enacted by parliament, that all such messuages, lands, rents and hereditaments as had been theretofore devised to any of the said companies, and which lands, tenements, rents and hereditaments were mentioned or named in the letters patent of Edward VI., should and might for ever thereafter be lawfully held and retained by the said several companies for ever, against the King and his heirs and succes-

(a) These were quit rents belonging to the dissolved monasteries and which had vested in the Crown under the statute of 26 Hen. 8, c. 26, or the 31 Hen. 8, c. 13, and were unconnected with the bequest in the will of Sir Thomas Kueseworth.

(b) A private statute.

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[*159] sors, without *any rent, account or any other profit to them to be paid for the same, any defect in the letters patent notwithstanding; saving the rights of any person, other than the King, his heirs and successors, and those claiming under him or them, and not claiming under the companies.

This information was filed in 1833, its object being, as has already been stated, to obtain a declaration that the estates were subject to the charitable trusts mentioned in the testator's will, and to have them carried into effect under the direction of the court.

As to the various payments directed by the will, it was alleged by the relators, that all but one, which was for maintaining an anniversary and *obit* for ever, were for charitable uses, which ought to be carried into effect by this court, either pursuant to the directions of the will, or as near thereto as reasonably might be, having regard to the changes of circumstances which had taken place. On the other hand the defendants alleged, that of all the payments which the will directed to be made, one only, namely for the prisoners of Newgate and Ludgate, was for a purpose which could properly be considered as a charitable purpose; that all the other payments were directed to be made for superstitious uses, and that the only charitable purpose had been fully performed. The defendants further contended, that the sums directed to be applied to superstitious uses, or the lands out of which they issued, became vested in the Crown, under the statute 1 Ed. 6, c. 14, which passed in the year 1547; that by the letters patent, dated the 4th of July, 1550, which was in the fourth year of the reign of King Edward VI., the various sums directed to be so applied, and which had become vested in

the Crown, were, for valuable consideration, granted by the King to [*160] the Fishmongers' Company; that by the grant *of these sums, it was intended to secure the lands out of which they were payable to the company; but doubts having arisen on the subject, the act of parliament had passed in the fourth year of King James I., by which those doubts were removed; and that the lands became absolutely vested in the company for their own use and benefit, subject only to the performance of that single charitable use, which, as they said, had been created by the will of Kneseworth, and which they had performed.

The defendants admitted, that since these grants had been made, they had applied very considerable parts of the income derived from Kneseworth's estate to charitable purposes, more or less connected with or arising out of the purposes expressed in his will; but they said that they had done this, only out of a pious regard to the memory of Kneseworth, and not from any obligation to which they were subjected.

Mr. Temple, Mr. C. P. Cooper and Mr. O. Anderdon, in support of the information:—All the trusts, including the *obits*, were good at the death of the testator, for even Henry VIII., by his will, instituted an *obit* at Windsor; (a) some

(a) Nicholl's Royal Wills.

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authority, subsequent to the death of the testator, must therefore be produced not only to invalidate the gift, but to show a title in the defendants; for trustees cannot set up the right of third parties to enable them to retain trust property adversely as against their *cestui que trust*.

The statute of 1 Ed. 6, c. 14, is the only one which affects the validity of the gifts, and the question is, whether any of them come within the provisions of this statute; for, as was observed by Sir W. Grant, in [161] *Cary v. Abbot*,^(a) "there is no statute making superstitious uses void generally; the statute of Ed. 6, relates only to superstitious uses of a particular description then existing." The *obits* are the only bequests in this will which come within the express terms of that statute; all the other bequests are therefore good, valid and subsisting charitable trusts which ought to be carried into effect *cy-pres* by the court. If, however, the direction to pray for the testator's soul, though not within the statute, be deemed superstitious or contrary to the policy of the law, the effect would not be to vest the property in the Crown, or to destroy the bequests, but the fund would still be applicable *cy-pres* to charity; *Attorney General v. Combe*,^(b) *Attorney General v. Guise*,^(c) *Brantham v. East Burgold*,^(d) *Cary v. Abbott*,^(a)

With respect to the gift to the four priests, the act of the 1st Ed. 6, c. 14,^(e) does not extend to the Universities of Cambridge and Oxford, but it gives the King the power of altering the name of the charities therein and the foundation of the same,^(g) this gift, therefore, has never been forfeited to the Crown; and it may be assumed that the exhibitions, which it is admitted have since been supported by the Fishmongers' Company out of the rents of the Kneseworth estate, have in this manner been substituted for the four priests.

As to the gift of 8*d.* a week to the thirteen poor men and women, it is of itself a good charitable gift, and must be executed unless it is invalidated by the direction that they should pray for the testator's soul; such a direction to pray for souls is not contrary to the law; *Hynshaw v. Morpetti Corporation*,^(h) and so it has been lately held in *Mary Woolfrey's case* before Sir Herbert Jenner; if, however, such prayers be considered superstitious, or contrary to the policy of the law, still as the primary object of the gift to these thirteen poor men and women was charity, and the ceremony to accompany it was not the substantial part of the gift, but a mere accessory or secondary object, the charitable bequest will remain valid though the superstitious ceremony be void; *Hart v. Brewer*;⁽ⁱ⁾ *The Dean of St. Paul's Case*;^(k) it is clearly settled that property being once devoted to a charity which fails, is still applicable to charitable purposes; *Attorney General v. Green*.^(l)

The direction to lend the 100 marks is also valid, and the requirement that

(a) 7 Ves. 494.

(b) 2 Cas. in Ch. 18.

(c) 2 Vernon, 266.

(d) Cited in 2 Ves. jun. 388.

(e) Sect. 19.

(g) Sect. 20.

(h) Duke, 242.

(i) Croke Eliz. 449.

(k) 4 Co. Rep. 103, a

(l) 2 B. C. C. 492.

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the parties borrowing them shall say *paternosters*, &c., which are similar to the prayers of the Church of England, does not invalidate the gift.

The letters patent of Queen Elizabeth professed only to grant the quit-rents which belonged to the monasteries of Kilburn, Merton and Barking, which had become forfeited to the Crown on the dissolution of those monasteries and were held independent of the will of Sir Thomas Kneseworth, and the 53s. 4d., which, it may be assumed, was the amount expended in his *obits* for five years previous to the statute of Ed. 6; the statute confirmed to the company the right which the Crown had under the statute of Ed. 6, and the residue still remains applicable to charitable bequests.

[*163] "The conduct and dealing of the defendants with this estate shows clearly that it is subject, even in their own opinion, to charitable trusts: they have kept separate accounts of the Kneseworth estate: they have constantly and uniformly applied the greatest part of it in charity: the chamberlain of London has attended the taking of accounts, as directed by the will and the breakfast has been provided. All this is consistent only with the property having been duly devoted to charity; and after such continued usage for a series of years, it may now be assumed either that the bequests, except for the *obits*, were not forfeited, or, if forfeited, that the Crown has allowed the company to retain the property, on the understanding that it should be applied to the good purposes pointed out by the testator's will.

After such continued usage it is fair to assume a valid foundation of a charity; it may have happened that the superstitious ceremonies had not been performed for five years before the act, so as to bring the case within it, or if the case came within that statute, then that the property may have been devoted by the Crown to like charitable uses,—a conclusion which is warranted by the preamble of the statute Ed. 6, which had in view the conversion of the rents applied to superstitious uses to erecting grammar schools, &c., the makers of that statute never intending to overthrow works of charity, but to take away the abuse: Co. Lit. 342, a. *Attorney General v. The Earl of Mansfield*.(a) This view is also supported by the statute of James, which recites, as a consideration for the confirmation of the grants, that the rents had been employed by the company to "the comfort of many good subjects, and great relief of the poor, and other good and charitable uses."

[*164] The Crown might "even have allowed the property to remain under the control and management of the company, on the faith and understanding that the superstitious uses should cease, and that the property should be applied to the good charitable purposes of the will of Sir Thomas Kneseworth. That many charities are now so held, appears from the reports of the commissioners of charities.

At all events, the company are only entitled to the amount of the specified bequests contained in the letters patent, which, by force of the act, were con-

(a) 2 Russell, 522.

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verted into rent-charges, and to no proportionate increase; the general residue will then be applicable to charity, under the direction of the court.

Mr. *Pemberton* and Mr. *John Romilly*, contra :—This is a case of extreme importance, because it not only questions directly the right to the large property particularly referred to in this information,^(a) and involves the destruction of all the charitable purposes to which for centuries the greater part has been benevolently applied, but it challenges the title of the other companies of the city of London to the whole of the rents and estates included in the grant of Queen Elizabeth, and in the act of confirmation of King James the First.

The defendants on their part insist that the whole of the gifts are superstitious, with the exception of that to the prisoners of Ludgate and Newgate, that such gifts and the lands out of which they issue have been granted to them, and they claim them beneficially, discharged of any [*165] trust except the one before specified. If, however, the bequests should be held to be valid, then they claim the whole rents and profits, subject to the specific payments directed to be made, and the amount necessary for repairs. The will itself shows that the testator intended the Fishmongers' Company to take some part beneficially; the direction that they shall forfeit ten marks, to be levied out of the devised estates, if the account was not yearly made, and the gift over to the city of London in case the company made default in performance of the trust, are quite inconsistent with the notion that the company were to have no beneficial interest in the property; it would be absurd in the extreme to make trustees liable to a penalty for their own default, and to direct it to be satisfied out of the trust estate and at the expense of the charity.

There are two cases only in which the court holds, by implication, a charity to be entitled to the whole increase of the income of the devised property: first, when the testator has in the commencement of his will expressly given the whole rents of his estate to a charity, and has subsequently apportioned out to charities sums which do not exhaust the whole income, in which case the court, in favor of a charity, and departing from its general rule that there is a resulting trust for the heir of all that which is undisposed of, holds that the whole income is applicable to charity; the second case is where, although the testator has not expressly devoted the whole income to charity, he has nevertheless given the whole amount of the income produced by the estates at the time the charity was created; where however there is a devise to a corporation or to individuals, subject to a particular payment to charities, the devisee takes the whole estate, sub- [*166] ject to the particular payments; *The Attorney General v. The Cordwainers' Company*.^(b) So where the whole is given to charity, and certain particular sums are given to one charity and the surplus to another, the

(a) Stated to be 78,785*l*.

(b) 3 Myl. & K. 534.

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former has no title to any increase in the event of an augmentation of the annual revenue: *Thetford School's case*; (a) *In re Jordyn's Charity*.(b)

The construction which the statute of the 1st Ed. 6, has judicially received completely determines that these gifts are superstitious. First, it has been held that where the superstitious use is of uncertain amount, so that the precise sum cannot be ascertained, the King takes the whole of the land, subject however to such good payments as the land was subject to in the hands of the feoffees. The decision was founded on this, that if, in such a case the King did not take the land itself which was given for the maintenance of an *obit*, he could take nothing. All the authorities establishing this proposition which occurred prior to the case of *Adams and Lambert*,(c) are set out in that case, as *Sir John Tate's case*,(d) *John Allen's case*,(d) *Turner's case*,(e) the resolution in *Adams and Lambert's case*.(g) In the present instance the amount of the *obit* being uncertain, the whole became forfeited to the Crown, neither entry nor office was necessary, the King being deemed by the statute to be in actual possession.

Secondly, it has been determined that where the whole land is given subject to a superstitious use, the King shall have the land, although the particular sum limited to the superstitious use, does not exhaust the [*167] *whole. *Sir Bartholomew Read's case*,(h) *Walpool's case*,(i) *Caley's case*,(k) *Gregory's case*,(k) the resolution in *Adams and Lambert's case*.(g) The only cases which are at all inconsistent with the second proposition are *Hewet and Wotton's case*,(l) and *Chibnal and Whitton's case*,(m) which are, however, distinguished by Lord Coke.

Thirdly, where a charitable use is connected with a use superstitious within the statute of 1 Ed. 6, the whole is void, and the King has the land; on this point *Sir Bartholomew Read's case*,(h) *Colborn v. Dale*,(n) *Adams and Lambert's case*, *Simon Peter's case*,(g) *Lady Egerton's case*.(o)

Fourthly, it has been decided that all donations to provide prayers for the soul, either public or private, are superstitious uses within the statute. *Sir John Tate's case*,(d) *Caley's case*,(k) *Gregory's case*,(k) *Colborn v. Dale*,(n) *Adams and Lambert's case*.(g) Every gift in the will of Sir Thomas Kneseworth, with the exception of that to the prisoners of Ludgate, is directly and in terms connected with a superstitious use.

It is not the *paternosters*, &c. themselves, but the superstitious application of them that renders the gift superstitious; the testator's intention being by means of mercenary prayers, to benefit the souls of the departed and lessen the period affixed for their duration in purgatory; praying for souls was founded on the notion of purgatory which it was the policy of the [*168] times to *discourage. The preamble of the stat. of the 1st Ed. 1.

(a) 8 Co. Rep. 130.

(b) 1 Myl. & K. 416.

(c) 4 Co. Rep. 96.

(d) Ib. 113, b.

(e) Ib. 115, b.

(g) Ib. 111, b.

(h) 4 Co. Rep. 113, a. (f) Ib. 113, b.

(k) Ib. 114, a.

(l) Ib. 109, b.

(m) Ib. 115, b.

(n) Duke, (Bridgman's ed.) 128; Anon. Duke, (Br. ed.) 128.

(o) 4 Co. Rep. 96.

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represents "purgatory and masses satisfactory to be done for them which be departed" to be a vain opinion; and the act invalidates not only *obits* and anniversaries, but any "other like thing, intent or purpose."

If these uses be held to be superstitious, then there is no authority for executing them *cy-pres* as good charitable trusts; under the statute they became vested absolutely in the Crown, discharged of the trusts, and the King cannot be deemed a trustee for any purpose.

The Fishmongers' Company have, it is true, voluntarily applied a considerable portion of the income of the property to charitable purposes, but they have always treated the annual undisposed of balance as their own, and have applied it to their general purposes. The mode of dealing with the property by the company would be very important if their title under the different instruments were doubtful, or if the information had alleged that the company had, by usage, created a valid and binding trust; but it is unimportant where the instruments show a good title in the company, and where the information contains no such allegation.

The defendants, therefore, claim the estate beneficially subject to the trusts for the prisoners, first under the will itself, and secondly, by means of the letters patent and the act of James I.

November 9.—THE MASTER OF THE ROLLS:—It appears to me that the effect of this statute of James I. was to vest in the Fishmongers' Company, for their own use, such lands or interests in lands mentioned in the letters patent of King Edward VI., as the Crown *was entitled to [*169] under the statute of the first of Edward VI.

Now one of the purposes for which Sir Thomas Kneseworth directed the rents of his estate to be applied was the finding and maintaining an anniversary and *obit* for ever, and it was necessarily and properly admitted, that this was a superstitious use within the statute; and supposing that any part of the rents was to be applied to purposes not superstitious, the crown, though it might not be entitled to the land, was, under the statute, entitled, in the nature of rent charge, to such sums as in any one year during the preceding five years had been applied to purposes to be deemed superstitious under the statute.

It is to be observed that the three rents of 10s., 10s. and 10s. mentioned in the letters patent of Edward VI. are particularly mentioned in the will as quit-rents to be paid by the receiver, and that, consequently, the 2l. 13s. 4d., described as the sum which the company had been accustomed to pay towards the perpetual support of two anniversaries for the soul of Sir Thomas Kneseworth, is all that in this instrument is described as the King's rent or annuity in respect of such application; and this I apprehend to be one of the points on which the relators principally rely, admitting, as they had properly done at the bar, that the maintenance of anniversaries and *obits* was a superstitious purpose, and contending that the King never took, and was not entitled to take, more than was granted by these letters patent.

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There is nothing to show what was the revenue arising from the estates in question, though, from the dispositions made by the will, it would seem probable that the income greatly exceeded the three quit-rents and [*170] the *2l. 13s. 4d.; neither is there any thing to show, whether King Edward VI. or Queen Elizabeth took any other part of the rents as rent charges under the statute of Edward VI., although the act of James I. may afford some reason for thinking that other compositions, besides that which was carried into effect by the letters patent, may have been made; but on the whole it appears to me, that any rent or payment to which the King was entitled as concealed, under the statute of Edward VI., and the land out of which the same was payable, was assured to the company by the statute of James; and taking into consideration the effect of this act, and also having regard to the nature of the present suit, which seeks to establish the trusts of Kneseworth's will and to carry them, and not any other trust created in any other manner, into execution, I think that the question to be determined in the cause is, whether the trusts of Kneseworth's will or any of them are good charitable trusts which have been violated by the defendants, and the execution of which ought to be and is now required to be enforced by the decree of this court.

Soon after the statute of Edward VI. questions arose, sometimes upon the uses which were to be deemed superstitious within the statute, and more frequently upon the effect of the statute in giving to the Crown either the land the rents of which were to be applied to the uses, or only the sums of money which had been annually applied to the uses, and upon that subject some distinctions which may appear rather nice were made; but it seems to me that the case of *Adams v. Lambert*, as reported by Coke and by Moore, and several of the authorities there cited, and the case of *Pitts v. James*, [*171] as reported by Rolle,^(a) and other cases stated in Duke *cannot be read without coming to the conclusion, that establishments or foundations for securing prayers for the souls of the dead were deemed to be superstitious and within the statute of Edward VI.; and upon these authorities I am of opinion that the directions of the will to which I have referred are such, that the payments made in respect thereof became the property of the Crown.

In the argument for the relators it was urged that the directions to which I have referred are only directions to pray for the souls of the dead, that such directions are not unlawful, and are not and never have been prohibited by the Church of England, and were not deemed to be superstitious at the time when the statute of 1 Edw. 6, was passed. It does not appear to me to be necessary, for the purpose of deciding this case, to enter into a minute examination of the doctrine of the church of England respecting prayers for the souls of the dead; the question is, whether the uses to which the testator has directed his property to be applied in perpetuity are such as to vest the land,

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or the moneys applicable to the uses directed by the will in the Crown, according to the intent and true effect of the statute of Edward VI.; and although prayers for the souls of deceased persons might not according to the doctrines of the Church of England be necessarily connected with the doctrine of purgatory, and although it might not be considered as an ecclesiastical offence to pray for the souls of deceased persons, or request others to do so, (upon which points I do not think it necessary to express any opinion at this time,) yet it might, nevertheless, as I conceive, be properly deemed superstitious to create an establishment or endow a foundation, to be continued in perpetuity and conducted with certain ceremonies supposed to be religious, for the purpose of securing the perpetual *continuance of [*172] prayers for the souls of the dead, either alone or in connection with other observances within the express terms of the act; and it appears to me that the question has been determined by authority.

There is nothing to show whether the sum of 100 marks was ever paid, but the gift of this sum for the better performance of the trust above mentioned leads to an inference, that at the time, the rents were not more than sufficient to answer the purposes to which the testator directed them to be applied.

Even in the directions for making and renewing loans out of the reserved fund the testator has intermixed directions for religious observances to be performed for the benefit of his soul and the souls of others, and the only charitable gift unmixed with superstition which I find in the will is that to the prisoners in Ludgate and Newgate. This might be sufficient to save the land from vesting in the Crown; but all the other applications directed to be made of the rents appear to me to be either gifts for superstitious uses, or to be so connected with superstition, or contrived for securing the continuance and perpetuation of the superstitious uses, that the rents payable and paid in that respect became the property of the Crown under the statute of Edward VI.; and, under all the circumstances of the case, I am of opinion that the estates devised by Kneseworth became the property of the company, subject only to the performance of the trust for the prisoners of Ludgate and Newgate, which has been performed, and, therefore, that this information must be dismissed with costs.[1]

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Necessary communications between a solicitor and client, through an unprofessional person, are privileged; but it not appearing in this case that the communications were wholly of a professional or confidential nature, such privilege was disallowed.

A case submitted since the institution of the suit, for the opinion of Dutch counsel and the opinion thereon, held privileged.

THE facts of this case are stated in 1 Beavan's Reports, 318. The de-

[1] Affirmed by Lord Cottenham, January 13, 1841, 5 Myl. & Cr. 11

1839.—Bunbury v. Bunbury.

defendant by his answer admitted that he had in his possession the letters and documents set forth in the schedule, and which related to the matters in the bill mentioned; but as to some of the letters he said they had passed between him and Mr. Innes, his agent, "when the rights and interests of the defendant were in question, *with reference to the institution and conduct of the aforesaid proceedings* of the defendant in Demerara, and to the defence of the defendant in this suit; and that all such letters passed between the defendant and Mr. Innes, *as the channel of communication between defendant and his solicitors and legal advisers* in Demerara, and in this country, in the aforesaid proceedings and in this suit."

As to other letters he said, they "had passed between Mr. Innes, Mr. Pierce, Mr. Billinghamurst, Mr. Smith, Mr. Lane, and Mr. Ross, after the death of the alleged testator, Hugh Mills Bunbury, when the aforesaid rights and interests of the defendant were in question, with reference to the institution and conduct of the aforesaid proceedings in Demerara;" and that all such letters passed between the said last mentioned parties respectively, "*as the channels of communication between the defendant and the other defendants and their solicitors* in this country and their advisers in Demerara, in the aforesaid proceedings."

It was stated that Mr. Innes, Mr. Pierce, Mr. Billinghamurst, Mr. [174] Lane and Mr. Ross were merchants in "London, Demerara, and St.

Vincent respectively, and that Mr. Smith was the plaintiff's counsel in Demerara.

A motion was now made for the production of the documents admitted to be in the defendant's possession.

Mr. Pemberton, Mr. G. Richards, and Mr. L. Wigram, in support of the motion. The rule is, that where a defendant admits the possession of documents relating to the matters in question *prima facie*, he is bound to produce them; *Tyler v. Drayton*.(a) There being such an admission, it is for the defendant to show from his answer a sufficient statement to entitle him to protection against the operation of the ordinary rule; *Storey v. Lord John George Lennox*.(b)

Here no sufficient statement is made by the answer to relieve the defendant from the necessity of producing the letters, for they are stated to have passed between the defendant and an unprofessional person; the necessity which exists of unreserved communication between a party and his professional adviser for the proper defence of his rights is the sole cause of the privilege which is extended to professional communications pending legal proceedings; *Bolton v. The Corporation of Liverpool*.(c) No such necessity exists for communicating between a party and an unprofessional person, and in such case there is no such privilege. Privilege has never been extended beyond communications between a party and his professional adviser.

(a) 2 Sim. & S. 309.

(b) 1 Myl. & Cr. p. 537; and 1 Keen, 341.

(c) 1 Myl. & K. 88.

1839.—*Bunbury v. Bunbury*

[THE MASTER OF THE ROLLS. I think it has been extended to the case of an interpreter. (a) Suppose "an illiterate man, unable to [*175] write, employed a person to write to his solicitor for him, would not such a communication be privileged?] Here no such necessity appears to have existed; besides which, these communications are not stated to have been of a professional nature; they may refer to matters quite foreign to the relation of solicitor and client. They cited *Nias v. The Northern and Eastern Railway Company*, (b) *Hughes v. Biddulph*, (c) *Bolton v. The Corporation of Liverpool*, (d) *Desborough v. Rawlins*, (e) *Greenlaw v. King*. (g)

Mr. Kindersley and Mr. George Turner, contra, contended that the letters were privileged, though addressed to unprofessional persons, inasmuch as such parties formed the medium of communication between the client residing in England and his solicitor in the colonies. They relied principally on the case of *Walker v. Wildman*, (h) where letters which had passed between the defendant's son and her solicitor were held privileged, Sir John Leach observing, "that the protection was the same whether the client communicated directly with his professional adviser, or through the intervention of a third person." They also cited *Greenough v. Gaskell*. (i)

November, 8.—THE MASTER OF THE ROLLS:—In this case it fortunately happens that there is no doubt respecting the rule which the court acts upon: it is conceded that an admission in an answer, such as occurs in the present, puts the defendant upon showing "that he is exempted from [*176] the production of the documents, and it is fully admitted, that any professional confidential communications which may have taken place between a party and his solicitor are also to be protected.

I believe that the case of *Walker v. Wildman*, (h) has never been in any way disputed, and I have some recollection of a case in which the principle there acted upon was carried still further; it certainly appears to me that there may be very many cases in which a party, not being able himself to have a direct communication with his solicitor, is compelled to employ an intermediate agent for the purpose of thus effecting a communication of matters of a confidential nature. In such cases the necessity, which arises, of transmitting such communications through another party, renders it privileged. The question is, whether the defendant in this case has protected himself within any rule of that kind which prevails, and I am of opinion that he has not. He relies upon this,—that Mr. Innes was the channel of communication between him and his solicitor. He might have been so, and yet a considerable part of the communications made by him through Mr. Innes might not, in any sense, be considered as professional or confidential

(a) See *Du Barre v. Livette*, Peake, 76; and 4 T. R. 756.

(c) 4 Russ. 190.

(d) 1 Myl. & K. 88.

(b) 3 Myl. & Cr. 355.

(e) 3 Myl. & Cr. 515.

(g) 1 Beavan, 137.

(h) 6 Mad. 47.

(i) 1 Myl. & K. 98.

 1839.—James v. Durant.

communications to be transmitted through Mr. Innes to the solicitor. It is upon that ground, and upon that ground alone, that I think I must order the production of the letters.

[*177] "A case "which, since the institution of this suit, had been stated on behalf of the defendants for the opinion of counsel in Holland, as to the rights and interests of the defendants, and stated with reference to their defence in this suit, and the opinion of counsel upon such case," were held by the Master of the Rolls to be privileged, and their production was refused.[1]

JAMES v. DURANT.

1839: December 24.

On the marriage of a lady, who was possessed of funded property and shares in water works, the funded property alone was settled; the settlement, however, contained a recital of an intention that all property which the wife or her husband, in her right, should after the marriage become entitled to, should be settled on similar trusts, and a covenant by the husband and by the wife, that all property which she or her husband, in her right, should after the settlement become entitled to, should be settled: Held, that the shares were subject to the trusts of the settlement.

At the time of the marriage of Mr. and Mrs. James, the latter was possessed of certain funded property, and some shares in the South London Water Works.

By the settlement made on their marriage, dated in 1816, after reciting that Mrs. James was entitled to the funded property, (but omitting all mention of the shares,) and reciting that it had been agreed "that the funded property and all other personal estate and effects of the said Maria Heathcote, which she or any person or persons in trust for her, or the said William James in her right, should at any time during the marriage become entitled to, exceeding in amount or value in any one gift or bequest the sum of 200*l.* and not otherwise," should be assigned to the same trustees, upon the trusts therein mentioned; and reciting that the funded property had been transferred into the names of the trustees; the trusts of the funded property were declared to be for the benefit of the husband, wife and children.

[*178] "The settlement contained a covenant on the part of Mr. and Mrs. James, that in case Mrs. James, "or any person or persons in trust for her, or the said William James in her right, should at any time or times *thereafter* during their joint lives become possessed of, interested in, or entitled to any sum or sums of money or other personal property, estate or effects whatsoever, exceeding in amount or value the sum of 200*l.* sterling at any one time, under or by virtue of any deed, will or other instrument, or

[1] Vide 1 Beav. 146, n. 2.

1839.—James v. Durant.

otherwise howsoever, then and in every such case the same sum or sums of money, or other personal property, estate or effects so exceeding in amount or value the sum of 200*l.* sterling should be from time to time paid, assigned and transferred; and that they the said Maria Heathcote and William James should, from time to time as and when such right, title or interest should accrue, or with all convenient speed thereafter, pay or cause or procure or otherwise permit and suffer to be paid, and well and effectually assign and transfer the same sum and sums of money or other personal property, estate or effects" unto the trustees, upon the same trusts as those declared of the funded property.

The question in this case was, whether the South London Water Works shares, which exceeded the value of 200*l.* were comprised in this covenant.

Mr. *Tinney* and Mr. *Loftus Wigram*, for the plaintiffs.

Mr. *Pemberton* and Mr. *Roupell*, for the husband, contended that he was entitled to all property possessed at the time of the marriage which was not expressly comprised in the settlement, and that the covenant was to extend only to future acquired property.

*Mr. *G. L. Russell*, for the trustees.

[*179]

Graftley v. Humpage(a) was cited.

THE MASTER OF THE ROLLS:—I think that these shares are subject to the trusts of the settlement, and I do not know how it is possible to construe the words in any other way. The marriage took place, and by virtue of that marriage the husband instantly, in his wife's right, acquired a title to the property in question. It seems then to me, that the case comes precisely within the words, and that the shares became subject to the trusts of the settlement.

Rarely are settlements entered into with such prudence as to fully carry into effect the actual intention of the parties, and where recitals are made in these general words I am afraid that their effect cannot be avoided, otherwise than by enumerating in the settlement itself any particular portion of the wife's property which it is intended shall not be subjected to the trusts.[1]

(a) 1 Beavan, 46.

[1] Vide *Towney v. Ward*, 1 Beav. 568, 570, n. 1. In *Hoare v. Hornby*, 2 Ye & Co. C. C. 121, it was held under the peculiar construction of the settlement, and the facts of the case, that certain property of the wife, not specifically included in the settlement, were not affected by it. Knight Bruce, V. C., at the conclusion of that case, observes: "upon the cases of *Graftley v. Humpage*, *James v. Durant*, and *Blythe v. Granville*, (6 Jur. 961,) I desire to be understood as neither stating nor intimating any opinion. Those decisions proceeded upon the instruments and facts which were in question in those cases. I decide this case upon a different instrument and different facts." As to the effect of a recital upon the construction of the operative part of a deed; see *Bailey v. Lloyd*, 5 Ram. 344. *Lindo v. Lindo*, 1 Beav. 496, 508, n. 1.

 1839.—Taylor v. Brown.

TRAVERS v. TRAVERS.

1840 : February 20.

In a marriage settlement the husband alone covenanted to settle any property which his wife or he in her right might thereafter acquire: Held, that property which was afterwards given to the wife for her separate use was not affected by the covenant.

On the marriage of Mr. and Mrs. Smith, certain property to which Mrs. Smith was then entitled was settled on the usual trusts for the benefit [*180] of the *husband, wife and children ; Mr. Smith alone covenanted to settle any property to which his intended wife or he, in her right, might become entitled during the coverture.

The father of Mrs. Smith subsequently, by his will, gave a portion of the income of his residuary estate to Mrs. Smith for her separate use.

The question was, whether certain arrears of this income, now in court, ought to be paid over to the trustees and invested by them upon the trusts declared in the settlement, or whether Mrs. Smith was entitled to have the amount at once paid over to her.

Mr. *Tinney*, Mr. *Pemberton* and Mr. *E. Teed*, for different parties.

THE MASTER OF THE ROLLS was of opinion that the fund in question was not comprised in the settlement, and ordered payment to Mrs. Smith.(a)

 TAYLOR v. BROWN.

1839 : November 12.

Where time is not of the essence of the contract, and there is unnecessary delay by one of the parties in completing, the other has a right, by notice, to limit the time for completing the contract, and upon default to abandon the contract.

A bill was filed by a vendor for the specific performance of a contract : the purchaser insisted that the contract had been abandoned : failing in this defence he was ordered to pay the costs of suit up to the hearing, and the usual reference was made as to title.

In 1834 the defendant became the purchaser of certain freehold property belonging to the plaintiffs. The sale was by auction, subject to certain conditions, with respect to which it is sufficient to observe that time was [*181] not made of the essence of the contract, and that *some delay was thereby anticipated in consequence of the residence of some of the vendors in Canada. It was stipulated, however, that if it should be necessary to send the conveyance to Canada, the execution by the parties should be obtained with all reasonable dispatch.

The abstract was furnished and submitted for the opinion of the defendant's conveyancer ; this being obtained, various communications took place

(a) See *Douglas v. Congreve*, 1 Keen, 423.

1839.—Taylor v. Brown.

between the parties, the plaintiffs endeavoring to comply with the requisition; and in order to remove the objections raised, considerable delay occurred in sending to Canada and in obtaining the requisite evidence. This, however, was not objected to on the part of the defendant until the time after stated.

The conveyance was executed, and in March, 1836, the answers to the remaining requisitions of counsel and further evidence and documents were furnished by the plaintiffs, and were submitted on the part of the defendant to his conveyancer. After this, frequent applications were made on the part of the plaintiffs to the defendant's solicitor, urging the completion of the contract, and some threats were held out of filing a bill for specific performance. Nothing satisfactory was done by the defendant until the 2d of July, when the further opinion of his conveyancer was furnished. Upon this, the vendors' solicitor obtained the further opinion of his counsel, and for the satisfaction of the defendant occupied himself in procuring the further evidence suggested by him. In this state of things, the defendant, on the 13th of July, 1836, abruptly insisted on terminating the contract by a letter written to the vendors' solicitor in the following terms:—"As you state that the most satisfactory evidence of the facts mentioned in certain requisitions that can be furnished has been *recently obtained from Canada, [*182] and have referred to documents B. as affording that evidence, and as my counsel is of opinion that these documents are not a sufficient compliance with the requisitions, I beg to inform you that I consider the agreement as at an end, and I request you to take notice thereof."

The vendors afterwards attempted to supply further evidence, but the defendant repeated his determination of abandoning the contract.

The vendors then filed this bill against the purchaser for a specific performance of the contract; by his answer the defendant still insisted that the contract had been abandoned, and also that the plaintiffs had not established their title to the property.

Mr. *Pemberton* and Mr. *Lloyd*, for the plaintiffs, asked for the usual reference to the Master as to the title; and they contended, that as the defendant had set up as a defence the abandonment of the contract, in which he had wholly failed, he alone had been the cause of all the litigation; that the defendant by the mode of his defence had also prevented the plaintiffs from obtaining, on an interlocutory application, the usual reference to the Master on the title, and consequently ought to pay the costs of the suit up to the hearing; they cited *Scoones v. Morrell*.(a)

Mr. *Kindersley* and Mr. *Spencer Follett*, contra, contended that the contract had been put an end to by the letter of the 13th of July, and that such a delay had occurred on the part of the vendors as warranted that proceeding

(a) 1 Beavan, 251.

1839.—Taylor v. Brown

[*183] "THE MASTER OF THE ROLLS :—The question which has been discussed in this case is, whether the defendant remains under any obligation to perform the agreement. He says he does not, and that he has ceased to be under any obligation from the 13th of July, 1836. Now as I have before stated, where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract,—in such case, if any unnecessary delay is created by one party the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this court; and where the time has been thus fairly limited, by a notice stating that within such a period that which is required must be done or otherwise the contract will be treated as at an end, this court has very frequently supported that proceeding; and bills having been afterwards filed for the specific performance of the contract, this court has dismissed them with costs.(a) [1]

This, however, is not a case of that description, for though I do not mean to say that the defendant might not at various periods of this transaction have given such a notice, yet he has not done so; for what happened, as I understand it, was this, that on the 2d of July, 1836, the defendant's solicitors sent Mr. Palmer's opinion that the requisition had not been complied with, and under circumstances which amounted to a demand of further explanation; and further explanation being given and being in the course of being obtained, on the 13th of July, 1836, the letter is sent, saying, from this time and on this very day I shall consider the contract at an end. Under these [*184] circumstances, I think the defendant is still under an obligation to

(a) See *Heaphy v. Hill*, 2 Sim. & St. 29; *Watson v. Reid*, 1 Russ. & Myl. 236.

[1] "In contracts relating to land, time is not in general considered in equity as of the essence of the contract, and it was once considered that it could not be made so, even by express stipulation. But after it had been decided that time might be made essential, the tendency of the decisions, especially those of Sir John Leach, has been to hold persons concerned in contracts relating to land, bound, as in other contracts, to regard time as material. And this principle has been applied with greater strictness where the property was connected with trade. These cases, [i. e. the cases supporting the above positions] appear to me so sound in principle, that I certainly will not be the first to shake them. *Heaphy v. Hill* and *Watson v. Reid* are direct authorities, that if one of two parties, concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform the contract between them, and the other contracting party to whom the notice is so given, makes no proper assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the performance of the contract, and will leave the parties to their remedies and liabilities at law." Wigram, V. C.; *Walker v. Jeffries*, 1 Harv. 348. The Vice-Chancellor, in the last sentence of the above quotation, seems to take a different and less rigid view of the rule deducible from the two leading cases above cited, and probably more conformable to their spirit than the Master of the Rolls, who intimates the necessity of "a notice stating that within such a period that which is required must be done, or otherwise the contract will be treated as at an end." Although *Walker v. Jeffries* was decided Jan. 11, 1842, the above case of *Taylor v. Brown*, is not noticed in the elaborate judgment of the Vice-Chancellor. See further, 1 Russ. & M. 237, n. 1; 514, n. 2. 2 Sim. & Stu. 30, n. 1. *Hobson v. Bell*, ante 17, 25, n. 1.

1839.—*Frost v. Capel.*

perform the contract. The decree will be, that upon showing a good title the contract must be performed.[1]

The only other question is, who is to pay the costs of the litigation up to this time? The litigation up to this time is not whether a good title has been shown, but whether that letter of the 2d of July, 1836, did or did not put an end to the contract; I am of opinion that it did not; and all the litigation and expense up to this time has been occasioned by the defendant's insisting upon that which he was not entitled to, and having wholly failed in the defence, I think the defendant must pay the costs of the suit up to the hearing.

FROST v. CAPEL.

1839: December 24.

A testator gave some pecuniary legacies to infants, to be paid to them on their attaining twenty-one; and by a codicil he directed, that as far as it might be practicable, all his legacies should be paid within six months after his decease: Held, that the direction in the codicil did not accelerate the time of payment to the infant legatees.

THE testator by his will, dated in 1834, expressed himself in these terms:—"I give and bequeath the following legacies, with the payment of which I subject and charge my personal estate, that is to say, I give and bequeath to William Webb Frost, Charles Maynard Frost, Catharine Sarah Frost, Henry Wigram Frost, Peter Frost and Elizabeth Jane Frost, children of my nephew, Robert Frost, lately deceased, the sum of 1000*l.* each, to be paid to them on their respectively attaining the age of twenty-one years."

The testator also gave other legacies, as to which he directed no definite time of payment.

By a codicil, dated in 1838, he expressed himself as follows:—"I desire as far as may be practicable, that all legacies shall be paid within six months after my decease."

*This bill was filed by four of the infant legatees of the legacies [*185] of 1000*l.*, against the executors and residuary legatees, to have their legacies paid into court under the statute 36 G. 3, c. 52, s. 32, with interest from the end of six months after the testator's death.

The executors, two of whom were the residuary legatees, contended that they were entitled, upon the construction of the whole will, to the intermediate interest accruing on the legacies between the death of the testator and the attainment of twenty-one years by the infants respectively; on the other hand it was contended, that under the terms of the will and codicil, the plaintiffs were entitled to the interest from six months after the death of the testator.

[1] As to the right of a vendee to put an end to a contract for the sale of land on the ground that a good title had not been shown, see further, *Hoggart v. Scott*, 1 Russ. & M. 293, 295, n. 1; 296, n. 2; *Tanner v. Smith*, 10 Sim. 410, 412, n. 2.

 1839.—Romilly v. Grint.

There appeared assets sufficient for payment of the legacies.

Mr. *Pemberton* and Mr. *W. Daniel*, for the plaintiffs, contended, that under the act in question it was practicable to pay the legatees in question within six months after the testator's decease.

Mr. *Kindersly* and Mr. *Paynter*, contra.

THE MASTER OF THE ROLLS :—The testator in this case has by his will and codicil given a great variety of legacies ; he has directed some of them to be paid without mentioning at what time, and others he has directed should be paid to the legatees at the age of twenty-one. The legacies of 1000*l.* each now in question were given by the will, with a direction to pay them to those persons on their respectively attaining the age of twenty-one years ; there is, therefore, a legacy given to each of them, with a distinct direction for its payment as the legatee should attain the age of [*186] twenty-one years. There appears to be a legacy precisely of the same kind in the last codicil, which last codicil contains this direction, "I desire, as far as it may be practicable, that all legacies shall be paid within six months after my decease." The question is, as it appears to me, whether this clause of the codicil was intended to accelerate the time at which the testator had previously directed the legacies to be paid,—that is whether he intended to revoke the direction to pay the legacies to these persons when they respectively attained the age of twenty-one years, and to direct the payment at the end of the six months from the time of his death. I think that by the words "as far as it may be practicable," the testator intended to have regard to the state of his assets and nothing else, and that when he speaks of all the legacies he speaks of those only as to which the time of payment was indefinite, and as to the others with respect to which the time of payment was specified in a prior part of the will, he did not mean to alter that time.

ROMILLY v. GRINT.

1839 : December 9, 16.

Defendant dispaupered with the costs of the application, on affidavits, which were not wholly contradicted by the defendant, showing that he was not in bad circumstances.

THE defendant in this cause obtained, *ex parte*, an order to defend *in forma pauperis* on the usual affidavit, "that his just debts being first paid, and his wearing apparel and the matters in question in this cause only excepted, he was not worth the sum of 5*l.*"

It was now moved on behalf of the plaintiff that this order might be discharged with costs, on the ground that the defendant was not a pauper.

The application was supported by affidavits of the plaintiff and his [*187] solicitor, showing that the defendant was carrying on business as a boot and shoemaker, and was apparently in good circumstances ;

1839.—M'Kenna v. Everitt.

many other facts were stated in the affidavits tending to lead to this conclusion.

The defendant, in opposition, denied some of these statements, but he allowed many of them to remain uncontradicted by him: he, however, again reiterated the statement "that he was not possessed of property of the value of 5*l.* beyond his wearing apparel, and that he was very largely indebted."

Mr. Parker, for the motion.

Mr. Hetherington, contra.

December 16.—THE MASTER OF THE ROLLS:—This application is to discharge an order obtained by the defendant to defend *in forma pauperis*; the grounds on which the application is made are, that the order was obtained on a false suggestion, and that the defendant instead of being a pauper is a person in good circumstances, that he is a boot and shoemaker, and has considerable property. An affidavit has been filed by the plaintiff, and the defendant has answered it, and the result is either that the defendant is a person putting on a fraudulent appearance of credit to carry on trade, or he has improperly obtained this order.

Having regard to the affidavits and facts stated, which are within the knowledge of the defendant, and the affidavit in answer, and the mode in which he has met some of the allegations, and the number he has not denied, it does appear to me sufficient to say this order ought not to stand, and must therefore be

Discharged with costs.[1]

*M'KENNA v. EVERITT.

[*188]

1839: December 16.

An *ex parte* order for the examination, *de bene esse*, of a witness "in her seventieth year, and very weak and infirm, and from her advanced years not likely to live long," discharged for irregularity, on the ground that she did not come within the rule, not being "seventy years of age," and not being in a "dangerous state of health."

Ex parte order for the examination, *de bene esse*, of a soldier under military orders to proceed abroad in about six days for six or seven years held regular.

ON the 23d of November, 1839, the plaintiffs obtained, on an *ex parte* petition at the Rolls, an order that they should be at liberty "to examine the said Elizabeth Everitt and Thomas James Davey as witnesses for the plaintiffs in this cause *de bene esse*, saving all just exceptions."

[1] The court refused to dispauper a plaintiff although in the possession of property, and in the exercise of business; the possession of the property being wrongful, the wrongful possession acquiesced in by the adverse party, and the business being necessary to the maintenance of himself and family. *Perry v. Walker*, 1 Yo & Coll. C. C. 676. And see *Isnard v. Cassaux*, 1 Paige, 39. *Oldfield v. Cobbett*, post 444.

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The grounds on which the order had been obtained, as stated in the order and verified by the affidavit of the clerk of the plaintiff's solicitor, were as follows: "he verily believes Elizabeth Everitt, widow, and Thomas James Davey of Woolwich, a private soldier in her Majesty's Corps of Royal Sappers and Miners, to be material witnesses on behalf of the plaintiffs in this suit, and without whose evidence, as this deponent is advised and believes, they cannot safely proceed to a hearing in this cause. And this deponent saith that the said Elizabeth Everitt is in the 70th year of her age, as she informed this deponent, and appears to be very weak and infirm, and from her advanced years not likely to live long. And this deponent saith he hath been informed by the said Thomas James Davey, and verily believes, that he the said Thomas James Davey is under military orders of her Majesty's government to proceed in about six days to the Island of Bermuda, on her Majesty's service, for the period of six or seven years."

It was now moved to discharge this order, and that the depositions taken thereupon might be suppressed for irregularity.

[*189] Mr. Treslove and Mr. Tripp, in support of the motion, contended that the order had been irregularly obtained, that it had been clearly settled that there existed three cases only, in which such an order could be obtained *ex parte*, namely, where the witness is more than seventy years of age, or is the only witness to a particular fact, or is in a dangerous state; *Bellamy v. Jones*, (a) *Tomkins v. Harrison*; (b) and that "if you come upon a case that you cannot arrange in that class you must give notice," *Bellamy v. Jones*. (c) That here the first witness was not stated to be seventy years of age, but in her seventieth year only, and that it was not sufficient that she was stated to be in an infirm state: nothing less than the witness being in a dangerous state would warrant an *ex parte* order; *Tomkins v. Harrison*. (b)

As to the second witness they contended there was no authority for obtaining an *ex parte* order for the examination of a witness on the ground of his being about to go abroad; and that if a witness in such a situation were allowed to be examined at all, it must be upon an order obtained upon notice: *Lee Dicher v. Power*, (d) where the order to examine persons who were about to go abroad was made "after hearing counsel on both sides." They also cited *Loveden v. Lord Milford*, (e) *East India Company v. Naish*, (g) Belt's note to *Hankin v. Middleditch*, (h) *Rowe v. —*. (i)

Mr. Pemberton, and Mr. Purvis, contra, contended that the very advanced age of the first witness, the infirm state of her health and the improbability of her living "long were together sufficient to justify the order as to her; with regard to the second witness, that the circum-

(a) 8 Ves. 31.

(b) 6 Mad. 315; Anon. 19 Ves. 331.

(c) And see 2 Daniel's Pr. 546.

(d) 1 Dick. 112.

(e) 4 B. C. C. 540.

(g) Bunb. 320.

(h) 2 Bro. C. C. 639.

(i) 13 Ves. 261.

1839.—M'Kenna v. Everitt.

stances were such as by the practice of the court justified the order; that orders of this description were warranted by the exigency of the case, and to prevent the loss of a witness' testimony; and that if the application had been made upon notice, the second witness might, in all probability, have left England before the motion had been disposed of, and his evidence would have been lost to the plaintiffs.

THE MASTER OF THE ROLLS:—I will examine the precedents in this case before deciding, understanding that this motion is made on the ground of irregularity, and not of any false suggestion having been made in obtaining this order.

December 16.—THE MASTER OF THE ROLLS:—I have looked at all the cases cited in the argument and many others, and I am of opinion that this order is not strictly speaking, according to the rule laid down, which is this, that when the age of a witness is the reason for an examination *de bene esse*, that witness must be at least seventy years of age, which this person is not; and where the health of the person is the ground for such an examination the witness must be shown to be in a "dangerous state," which is not the case here. I am therefore of opinion, that as far as relates to Elizabeth Everitt, the order must be discharged as prayed.[1]

With respect to the other party, Thomas James Davey, he is stated to be a private soldier and "under the orders of government to proceed to Bermuda on her Majesty's service in about six days, to remain for seven *years;" and as to him it has been contended that the order is ir- [*191] regular. I have read through all the cases, and I find several in which it appears settled, that an order *ex parte* to examine a witness *de bene esse* is of course where the person is seventy years of age, or is in a dangerous state of health, or is the only witness to a material fact in the cause; yet I do not find that it has ever been distinctly stated by the court, that an order of course may not be obtained for the examination of a witness who is about to quit the kingdom.[2] There is a case, however, in the 13th volume of Vesey,(a)

(a) *Shelley v. —*, 13 Ves. 56.

[1] There may be circumstances in the case, which will induce the court to permit an examination *de bene esse*, although not strictly within the rule above laid down. Thus, where an application was made to examine the surviving witness to a will, *de bene esse*, on the ground that the parties concerned all lived in a foreign country, and that the surviving witness was greatly afflicted with the gout, the order was made, although the witness was only stated to be upwards of sixty years old. *Fitzhugh v. Lee*, Amb. 65. So, also, where the age of the witness was not stated, but the affidavit upon which the application was made, alleged only that the witness was subject to violent attacks of the gout, and from these attacks was under the apprehension of dying, and that he was a material witness; his testimony being required to prove the draft of a bond which he had prepared but which was lost; the Court of Exchequer made an order for his examination, *de bene esse*. *Jepson v. Greenaway*, 2 Fowl. Exch. Pr. 103. And see 1 Barb. Ch. Pr. 271.

[2] So, Wigram, V. C., held that an *ex parte* order to examine, *de bene esse*, a witness about to go abroad, was regular. *McIntosh v. Great Western Railway Co.*, 1 Hare, 328. Where a witness was about to depart the state, permanently to reside abroad, the court on petition verified by

1839.—*McKenna v. Everitt*.

in which the three cases for granting this order are stated to be, "first, witnesses of the age of seventy years; secondly, *witnesses quitting the kingdom*; thirdly, a fact depending upon a single witness;" and I have found a case in the time of Lord Hardwicke in which an order of course was granted for the examination of a witness who was about to leave the kingdom. This cannot be considered as a decided point; but upon consideration, it appears to me that justice may be in many cases defeated if such an order as this cannot be immediately obtained, and it does not appear to me that the order is irregular; I cannot, therefore, discharge this order as to the second witness; but it must be discharged as to the first, and her depositions must be suppressed.[3]

affidavit, and motion for that purpose, ordered him to be examined *de bene esse*, without previous notice of the motion. *Rockwell v. Folsom*, 4 Johns. Ch. Rep. 165. If it is in the power of the party to detain the witness, an examination, *de bene esse*, will not be allowed. *The East India Co. v. Naish*, Bunb. 320.

[3] In what cases a witness may be examined, *de bene esse*, see further, 1 Hoff. Ch. Pract. 454. *et seq.* 1 Barb. Ch. Pract. 270, *et seq.* The question whether an order to examine a witness, *de bene esse*, on the ground that he was the only witness to a material fact, will be made upon an *ex parte* application, was brought distinctly before Lord Langdale in a subsequent case; *Hope v. Hope*, 3 Beav. 317, of which Mr. Barbour could not have been aware at the time of the publication of his work on Chancery Practice, (see vol. 1, p. 272.) In that case the Master of the Rolls said, "that he should not consider himself bound by any thing which had fallen from him in *McKenna v. Everitt*, on a point which had not been brought to his attention," and held that notice was necessary. At the conclusion of his opinion his Lordship says: "Under these circumstances, I have thought myself at liberty to consider whether the order ought to be made *ex parte*; and considering the nature of the order, and that, in the case of a sole witness in good health, the order is not required suddenly, as may be the case where a witness is very old, or in a dangerous state of health, or under orders to leave the kingdom, whilst, on the other hand, the affidavit may state circumstances of the sufficiency of which to warrant the order, the court ought to judge, and for that purpose to have the assistance of the parties interested to oppose, I think that the application should be made on notice; and this is a sufficient reason for discharging the order. I ought, however, to add, that even if the order could have been sustained as an *ex parte* order, the affidavit does not appear to me to be sufficient, either to show what the facts are upon which it is proposed to examine the witness, or that he is the sole witness of such facts; and I concur with Lord Erskine in *Rowe v. —*, (3 Ves. 261,) that the reasons for the belief ought to be stated." The order was discharged; "but considering the practice which has for a long time prevailed to grant such orders *ex parte*," it was without costs. As to what the affidavit should state, see further, 1 Barb. Ch. Pract. 273. By the Revised Statutes of New York, vol. 2, (2d ed.) p. 320, § 21; "Any person who is a party to a suit pending in any court in this State, or who expects to be a party in any suit about to be commenced, may cause the testimony of any witness material to him in the prosecution or defence of such suit, to be taken conditionally, and to be perpetuated." In the succeeding sections of the statute, the officers are stated to whom application may be made for such examination,—what proof shall be produced to such officer as the foundation of an order for examination—and the proceedings to be had thereon; but although the order must be served upon the opposite party, the statute does not require a previous notice of the application. There seems to be an opinion that the statute applies to proceedings pending in Chancery; but some part of its phraseology militates against that idea; nor is the necessity apparent, this court having ample power to act without legislative assistance.

1839.—Attwood v. Banks.

*ATTWOOD v. BANKS.

[*192]

1839; December 23.

Injunction granted to restrain a party from taking proceedings under the 1 & 2 Vict. c. 110, s. 8, by means whereof an act of bankruptcy might be deemed to have been committed by, or a *fiat* of bankruptcy issue against the plaintiff.

Partners being indebted to their bankers, it was agreed between them that one should retire, that the assets should be transferred to the continuing partners, who were to take upon themselves the partnership liabilities, and that the bankers should release the retiring partner from his liability. The bankers signed a memorandum acceding to the agreement, and having afterwards attempted, by means of the debt, to make the retiring partner a bankrupt, they were restrained from so doing by an injunction.

THE plaintiff carried on business as a glass manufacturer in partnership with the defendant Hart, and he also carried on business as an alkali and soap manufacturer in partnership with the defendants Tulk and Banks. Articles of partnership between them had been prepared but not executed.

The partnerships became indebted to their bankers, Messrs. Ridley & Co., (who were also defendants,) to the extent of 33,000*l.*, which was secured by mortgages, bonds and policies. The partners did not agree amongst themselves, and an arrangement was made, which appeared to have been brought about by the bankers themselves, whereby the plaintiff was to retire from the two firms on the 27th of April, 1839; and the plaintiff and the defendants Hart, Tulk and Banks, entered into an agreement, by which it was stipulated that the partnership should be dissolved, that the partnership property of the alkali and soap works should be transferred to Tulk, and of the glass works to Hart; "that all accounts and reckonings by and between the parties, including Banks, should be considered as settled and adjusted; and that mutual releases should be given; that the continuing parties should pay off, in due course, all joint debts, and discharge all joint liabilities and demands, actions, suits and legal proceedings against the firms or the partners or any of them in respect thereof, as the *same appeared by [*193] the books of the said partnership, or in such cases as where the accounts were not yet delivered: and to release and guarantee the plaintiff therefrom;" and it was further stipulated as follows:—"The bankers, at the end of three months from the date hereof, to release the said Attwood (the plaintiff) from all liability on account of the debts due to them, including the mortgages, bonds and assignments of life policies."

Messrs. Ridley & Co., who had united themselves in business with a district bank, assented to the agreement of the 27th of April, 1829, and one of the partners of the firm of Ridley & Co. signed a memorandum thereon, *acceding to and confirming the agreement so far as they and the district bank were concerned.*

Differences arose, not only as to what was to be considered partnership property to be transferred to the continuing partners under this agreement, but also with respect to the partnership liabilities, and in September, 1839,

1839.—Attwood v. Banks.

the plaintiff filed his bill for the specific performance of the agreement of the 27th of April, 1839.

In the month of November following the bankers, notwithstanding their assent to and confirmation of the agreement, took proceedings under the statute for the abolition of imprisonment for debt,^(a) to make the plaintiff and his copartners bankrupts, and accordingly they filed an affidavit of debt, and served the plaintiff with a copy of the affidavit and with notice requiring immediate payment of such debt. The effect of this was, that if plaintiff did not, within twenty-one days, pay or secure the debt, or give such [*194] security as a *commissioner of the Court of Bankruptcy should approve of to pay or to render himself into custody, he would have been deemed to have committed an act of bankruptcy on the 22d day after service. In consequence of this the plaintiff filed a supplemental bill against the bankers, the district bank and his three former partners, praying an injunction to restrain the bankers from doing any act, &c., whereby or by reason or means whereof the notices, affidavits and other proceedings in the supplemental bill mentioned, on the non-payment of the debt, or not securing the same might be or be brought forward against the plaintiff as the means or proof, or in or towards the proof, of his having committed or being, under or in reference to the provisions of the act of parliament mentioned, deemed to have committed an act of bankruptcy.

Mr. *Pemberton*, Mr. *Girdlestone* and Mr. *Simpson* for the plaintiff:—The bankers having concurred in and confirmed the agreement, and having thereby undertaken to release the plaintiff from all liability, it is most unequitable in them to take advantage of the debt which they have agreed to release, in such a way as to cause the plaintiff to be made a bankrupt thereon, especially as on the faith of the agreement the plaintiff has given up all right to the partnership assets, out of which the payment ought to be made. If the plaintiff does not find security for the whole debt, which, from its great amount, it will be very difficult to do, then by the terms of the act of parliament he will be considered to have committed an act of bankruptcy, and any other creditor may then take advantage of it; the Court of Bankruptcy would then have no jurisdiction to interfere and prevent [*195] a commission issuing on the ground of *there being no debt, *ex parte Lanchester*; (b) this would work an irreparable injury to the plaintiff, which this court should prevent by injunction. That it has jurisdiction appears from the cases of *Beckford v. Kemble*,^(c) where the court restrained a mortgagee from proceeding in the courts in Jamaica to a foreclosure, and *Gascoyne v. Chandler*,^(d) where an injunction was granted to restrain proceedings in the Ecclesiastical Court, to set aside a will contrary to an agreement between the parties.

(a) 1 & 2 Vict. c. 110, s. 8.

(c) 1 Sim & Stu. 7.

(b) 17 Ves. 512, and 1 Rose, 220.

(d) 3 Swan. 418, n.

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Mr. *Kindersley* and Mr. *Gordon*, contra, contended that this court had no jurisdiction to entertain an application of this description, and that no instance could be adduced of this court having by injunction interfered with the issuing of a commission of bankruptcy. That the Court of Bankruptcy, as constituted by the 1 & 2 W. 4, c. 56, was "a court of law and equity,"(a) and was therefore fully capable of doing justice between the parties, and of taking into consideration the equitable grounds of objection here suggested by the plaintiff, and if there appeared to be no debt that court would interfere and prevent an adjudication, as in the case of *ex parte Fletcher*.(b)

That this court would not restrain proceedings in another court of equity where it was shown that the latter had full jurisdiction and the means of doing justice between the parties. [THE MASTER OF THE ROLLS. Not long since I myself had occasion to grant an injunction to restrain proceedings in the equity *exchequer.(c)] They further contended [*196] that there appeared no sufficient consideration for the agreement, and that the bankers were justified in obtaining security for their debt.

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS:—This is undoubtedly an application of the first impression, and it must necessarily be so, because the mode of proceeding which is here complained of was first sanctioned by the act which very recently passed for abolishing imprisonment for debt in certain cases.

It is clear that the agreement which seems to have been entered into between the plaintiff and his partners was not, of itself, a sufficient protection to him, because, whatever his partners might agree to, they could not exonerate him from the demands which the creditors of the concern had against all the partners individually, and therefore it was, that before this agreement could be finally concluded application was made to the bankers; they quite concurred with the plaintiff's partners in the course intended to be pursued; and they signed a memorandum indorsed on the agreement in these words:—"We accede to and confirm this arrangement, so far as we and the district bank is concerned." The bankers having confirmed the agreement, it then appeared safe enough for the plaintiff to act upon it; and *he [*197] thereupon relinquished the possession of the partnership property to the continuing partners and retired; if no dispute had afterwards arisen among the partners there would probably have been no question with the bankers.

It appears, however, that after this agreement had been signed differences arose between the partners; and in the month of September, 1839, the plaintiff filed his bill for a specific performance of the agreement, and offering of

(a) Sect. 1.

(b) 2 Dea. & Ch. 90; and see *Ex parte Foster*, 1 Rose, 49, and *Ex parte Proston*, 1 Rose, 259.

(c) *Boulter v. Boulter*, Rolls, 7 and 12 Dec. 1838, in which, there being a suit in this court involving mortgaged property, a mortgagee had assented to a sale; and there being some delay in the proceedings, he afterwards filed a foreclosure bill in the Exchequer, which the Master of the Rolls, after argument, restrained him from prosecuting.

1839.—Attwood v. Banks.

course to do every thing that remained on his part to be done, to give up all his claim to the partnership property, and calling on the continuing partners to exonerate him from all the partnership liabilities.

Very shortly after this Messrs. Ridley & Company seem to have thought that they might act just as if they had never confirmed this agreement between the partners, and that they were entitled to treat Mr. Attwood as their creditor, in the same way as if they had never agreed to exonerate him and to accept the liability of the continuing partners. Accordingly they take these proceedings against him with a view of making or procuring Mr. Attwood to be made a bankrupt, upon the footing of the debt comprised in the agreement which they had confirmed, and by which the other partners agreed to exonerate him; the consequence was that this supplemental bill was filed, praying that they might be restrained from that course of proceeding. To this bill, the bankers and Mr. Tulk and Mr. Banks, who were partners, and Mr. Hart, a partner with Mr. Attwood in the other firm, were made parties: they have filed demurrers, and demurrers have been filed on the part of persons representing the district bank. I do not, however, think that these demurrers can be sustained for want of equity, or on the ground of multifariousness, or on any ground whatever, unless they can be sustained upon this, that this court has no jurisdiction to interfere. I think the whole statement of the facts shows that an unjust attempt is made to use that debt in violation of the agreement; and, therefore, the motion, as well as the demurrers, depends on the single question whether this court has jurisdiction.

When new modes of proceeding are introduced into courts of justice, it usually happens that attempts are made to take advantage of them and to apply them in a way very different from what was intended; in short, a new weapon,—a new power is put into the hands of persons who, when they find they can do so, are inclined to make an improper use of it. Every attempt of that sort must necessarily give rise to an application of the first impression in courts of equity; fortunately, however, courts of equity act on general principles, and if they find parties taking an unfair advantage of such new proceedings, this court will interpose the jurisdiction which it undoubtedly possesses, and prevent that unconscionable mode of proceeding.

Here the bankers have agreed to accept other persons as their debtors, and by that agreement the plaintiff has been induced to give up his share in the partnership property, and to transfer it to the separate possession of those who were to sustain the liability: in short, he has been induced by the act of the bankers themselves to denude himself of the means of payment, and to place those very means in other hands. Is it not against conscience for those who have induced him to do so to proceed against him in that unprotected state, and to demand against him the same right as if they had never caused him to adopt that course of proceeding? I cannot doubt but that [*199] this is an unequitable proceeding. It is said, however, on the part

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of the defendants, that this court ought not to exercise a jurisdiction because the Court of Bankruptcy has jurisdiction. I was much surprised at the way in which that argument was conducted. It seems to be conceded, that the Court of Bankruptcy, in the present state of things, has no power whatever to interfere; the only thing the Court of Bankruptcy can do, is to determine the security to be given for answering any sum which may be recovered in an action: the Court of Bankruptcy has not, in the present state of things, any jurisdiction beyond that. But then it is said, "Let this matter go on,—let these parties proceed,—let them avail themselves of this particular debt, from which they agreed to exonerate the plaintiff, so far as to sue out a *fiat* in bankruptcy, and then the commissioners will have jurisdiction to determine whether there is a valid or sufficient petitioning creditor's debt." True, that after the *fiat* is issued they may have power to consider as to the validity of the debt; but is that a reason why the parties should be allowed to proceed on this debt so far as to sue out the *fiat*? I concur in the other argument which has been used, that there never was an instance of an application of this kind before; there could not have such a thing before as an application to a court of equity to prevent a party suing out a *fiat* in bankruptcy, nor do I think any injunction for that purpose could be granted. The only question is, whether the court has jurisdiction to say that these parties, having entered into this agreement with respect to this particular debt, are afterwards entitled to use it for the purpose of proceeding to take out a *fiat* of bankruptcy against the plaintiff. I have no doubt in my mind as to the jurisdiction of the court to interfere; if there is any difficulty it is in framing the particular order. The words ought to be, to the effect of restraining the parties from adopting any proceeding *whereby, or [*200] in consequence whereof, Mr. Attwood may be deemed under the provisions of that act of parliament to have committed an act of bankruptcy by not giving security for this particular debt: that is the only protection the plaintiff is entitled to. If the proceeding which has already taken place is to be deemed an act of bankruptcy to support a *fiat* issued by any other person, I cannot protect the plaintiff from it. As to the demurrers, they must be overruled.(a)[1]

(a) *Extract of Order*:—Injunction against Sir M. W. Ridley & Co., "to restrain them and their agents from taking or prosecuting any proceeding, or doing any act by means or in consequence whereof an act of bankruptcy may be deemed to have been committed, or a *fiat* of bankruptcy may be issued against the plaintiff in respect of the debt" in the bill mentioned, until further order.

[1] Vide *Perry v. Walker*, 1 Yo. & Coll. C. C. 672.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE ROLLS COURT.

BAMFORD v. WATTS.

1840; March 30, 31

Where a party is served with a petition or notice of motion, he is not bound to take upon himself the responsibility of deciding whether his interest in the matter is such as to render it unnecessary for him to appear; and he will not be deprived of the costs of his appearance, on the ground that he is not interested in the matter.

A promise by a party to make no opposition to an application intended to be made by another is not, of itself, a sufficient ground for refusing him the costs of his appearance.

THIS was a petition for payment out of court, in discharge of debts of the testator, of funds which were the produce of sales under the court: the money had been paid into court by the purchaser, but the purchase had not been completed.

The solicitors of the purchaser before the petition had been presented, had stated that they had no objection to the purchase money being paid out; and that they would not oppose any application made by the plaintiff for that purpose. After the service of the petition on them, they stated that it was their intention to instruct counsel to appear on the petition, whereupon [*202] the plaintiff's solicitor "remonstrated against their so doing, and expressly stated to them, that if they did appear upon the petition, it would only be at their own expense, as there was no reason for their doing so."

At the hearing of the petition,

Mr. *Faber* appeared for the purchaser and made no opposition, but asked for the costs of the purchaser's appearance.

Mr. *Stinton*, contra, for the petitioner, contended that the purchaser ought to be at the expense of the appearance as it was quite unnecessary, for having expressly stated that no opposition was intended, the purchaser had no longer any interest in the matter of the motion; that he ought not to have appeared, but should have allowed the prayer of the petition to have been granted on affidavit of service.

 1840.—Holden v. Kynaston.

THE MASTER OF THE ROLLS:—The rule of the court on this point has varied (a) Sir Thomas Plumer said that he would not allow the costs of an appearance where the party, though served, was not interested in the matter, and he acted on that opinion. The rule, however, has been very different since his time, and it has been considered that where a party is served with a petition or notice of motion he is not bound to take upon himself the responsibility of deciding whether his interest in the matter is such as to render it unnecessary for him to appear; instances have occurred where parties have been greatly prejudiced by their solicitors taking upon themselves that responsibility. The rule of Sir T. Plumer has [*203] been deviated from, and it is now settled that where a party is served with a petition or motion, and he appears and makes no opposition, he will notwithstanding be considered as entitled to appear, and if there has been no improper conduct on his part to have the costs of his appearance.

In this case it is said that the purchaser did not intend to make any opposition to the application, which, it must be observed, is very different from saying he would not appear; although he said he would make no opposition, yet he expressly stated his intention to appear.

I must, therefore, read over the affidavits, the only thing for me to consider being, whether there are any grounds to make this an exception to the general rule.

March 31.—**THE MASTER OF THE ROLLS** said he had read the affidavits, and though he did not approve of the conduct of the purchaser, yet that the facts were not strong enough to deprive him of his costs.

***HOLDEN AND MELLERSH v. KYNASTON.**

[*204]

1840: March 9.

Where a debt is claimed or a demand made in a suit, and the defendant, admitting his liability, offers to pay the debt or comply with the demand and to put the plaintiff in the same situation as he would have been in if the liability had been satisfied without suit, the court, on motion, will stay all further proceedings.

Proceedings in a creditor's suit stayed as against some defendants on payment of one of the plaintiffs' debts, on which alone the defendants applying were liable, and, under very special circumstances, without costs.

THE intestate was indebted to the plaintiff Holden in the sum of 150*l.* which was secured by the joint and several promissory note of the intestate and of the defendants Davis and Channell. He was also indebted to the plaintiff Mellersh upon another promissory note, on which Bridges, another defendant, was jointly liable.

(a) See *Templeman v. Warrington* and *Heneage v. Aikin*, 1 Jac. & W. 377; *Garey v. Whittingham*, 1 Turn. & R. 405.

 1840.—Holden v. Kynaston.

After the intestate's death, Holden and Mellersh filed this bill, on behalf of themselves and all other the creditors of the intestate, for the administration of his estate; to this bill the administrator of the intestate, and Davis, Channell and Bridges, were made defendants.

No demand had been made, previous to the institution of the suit, on Davis and Channell for payment of the amount due on their promissory note, and shortly after the bill had been filed, and before Davis and Channell had appeared, an offer of payment had been made by them, which was refused; on the 10th of January, 1840, an offer was also made to pay the amount with costs, which not being accepted, notice of motion was given on the 28th of January, by Davis and Channell, that upon payment by them to the plaintiff Holden, of the sum of 150*l.* and interest, the bill might be dismissed as against them.

Pending the proceedings in this suit a decree had been obtained in another creditor's suit for the administration of the intestate's estate, in which, [*205] as was *stated, a part of the testator's assets had been paid into court.

Mr. Bethell, in support of the motion, cited *Pemberton v. Topham*.(a)

Mr. Pemberton, contra :—The motion is irregular, asking on the part of some of several defendants that the bill may be dismissed; at the utmost, proceedings alone can be stayed. There will be difficulty too in discharging one of the debts on which the suit is founded; besides which the representatives of the intestate, who are jointly liable with Davis and Channell, are not present, and regard must be had to the equities between the three persons jointly liable.

THE MASTER OF THE ROLLS :—This suit, so far as it related to the administration of the estate of the intestate and to obtaining payment out of the assets, seems to have been properly enough instituted, at least there is nothing now before the court in any way to impeach it.

The two defendants, on whose behalf the present motion is made, having, before they had appeared, heard that they had been made parties to the suit and knowing themselves to be liable to the payment of this debt, made an offer to the plaintiff to discharge it. Nothing could be more proper than that proceeding,—it is certainly one which is in every way to be encouraged. The offer was made, but was not accepted. There might have been some [*206] reason for hesitating in accepting the *offer, since it was a proposal to pay one of the two debts upon which the suit was brought, and it was made by two parties in the absence of the third, who was jointly liable; hence there might have been some ground for inquiry and consideration before that offer was accepted; but with regard to the equities between the parties, I do not see that the plaintiff had any reason to trouble himself about them.

1840.—Holden v. Kynaston.

This offer being refused, these defendants make this application to the court upon the subject. I confess I think that where a debt is claimed or demand made in a suit, and the defendant, admitting his liability, offers to pay the debt or comply with the demand, and to put the plaintiff in the same situation as he would have been in if that liability had been satisfied without a suit, it is the bounden duty of this court to put a stop to any further proceedings; and I shall never hesitate unless, I am controlled by higher authority, to comply with an application of that sort. The question which I have now to consider here is, how the parties are to be put in the same situation, or as nearly as may be in the same situation. It seems that whilst these proceedings have been going on another suit has been instituted, and a decree obtained for the same purpose. Now if this suit was rightly instituted, which I think was the case, and yet as against the defendants who now make the application it ought to be stopped, then, although it is not the duty of the defendants to pay the costs, because in the first instance they were ready to perform their duty, yet as one of the plaintiffs has still a demand unsatisfied, and will be obliged to go in in the other suit, the costs of the proceedings in this suit ought to be satisfied in the other.

*What I conceive to be the justice between these parties is, that the [*207] defendants should pay to the plaintiff, to whom the debt is owing, the amount due to him; that the proceedings in this cause should be altogether stayed; that the plaintiff whose demand is unsatisfied should be allowed to go in under the decree in the other suit; and that the costs of this cause which have been hitherto incurred should be paid out of the assets realized in the other suit. I think, also, that the costs of this motion should be paid by the plaintiff, and be added to those costs of the suit, and be paid out of the assets in the other suit. [Mr. Pemberton. 'The costs of this motion are not asked in the notice.] My opinion is, that your client ought to be saved from any costs properly incurred in this suit, but I cannot direct the parties making this application to pay them. If I cannot make any general order, what I must order is this, that the sum due be paid, and that all further proceedings in this cause be stayed as against these defendants.(a)

(a) The order as drawn up merely ordered the defendants to pay within ten days to Holden, and that Holden should accept the 150*l.* and interest; and upon such payment all further proceedings in this suit against Davis and Channell be stayed. Nothing was said as to costs.

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*WEDDERBURN v. WEDDERBURN.

1840 : January 23.

After decree the court has jurisdiction. at the instance of a defendant, to enjoin the plaintiff from proceeding in another court in respect of the same matter.

After decree here, the plaintiff cannot, except by leave of the court, proceed in another court in respect of the same matter, even though such proceedings are merely auxiliary.

THIS suit was instituted by persons beneficially entitled to the estate of David Webster, against his surviving partners and persons who had succeeded them in the business, and it sought to participate in the profits which had been made in the partnership business, from the death of David Webster in 1801 to the present time.

The case was heard by the Master of the Rolls, and a decree was then made for the plaintiffs, (a) which was afterwards affirmed by the Lord Chancellor on appeal. (b)

While the parties were taking the necessary accounts under the decree in the Master's office, the plaintiffs commenced proceedings in the Court of Session in Scotland against several of the defendants, who had heritable property there; the object of which was to obtain the Scotch process of *inhibition and arrestment*, by which, as was stated, in a very early stage of a suit, the pursuer acquires a lien upon all the heritable property of the defendant for whatever he may eventually recover; and the process being recorded operates as notice to all future purchasers and mortgagees, so that in effect the defendant, from the commencement of the suit, is restrained from dealing with his property.

The Scotch summons stated the partnership, and the different circumstances mentioned in this suit, and the proceedings and decree there-
[209] in; it also stated that *the share of profits belonging to the estate of David Webster from 1801 to 1836 amounted to 462,076*l.*; and it showed clearly that the proceedings were in respect of the same demands as were the subject of the suit here.

It was now moved on the part of the defendants, that the plaintiffs might be restrained by injunction from prosecuting the suits or actions in Scotland or any other suits or actions.

Mr. *Kindersley* and Mr. *Colvile*, for the motion:—It will be objected on the part of the plaintiffs, that this is a motion for an injunction made on the part of the defendants; and that, on the authority of *Brown v. Newall*, (c) such an application is not regular. There are, however, many authorities which show that the court will grant an injunction against a plaintiff, where the circumstances are such as to render such a step proper, and especially after decree; *Mocher v. Reed*, (d) *Wilson v. Wether-*

(a) 2 Keen, 722.

(d) 2 Mylne & C. 558.

(b) 4 Mylne & C. 41.

(c) 1 Ball. & B. 318.

1840.—Wedderburn v. Wedderburn.

herd, (a) *Booth v. Leicester*, (b) *Edgcombe v. Carpenter*; (c) in addition to this, the decree here is for an account which enures to the benefit of the defendants, who then become active parties in the suit. The only question is, whether this is or is not a proper case for the interposition of the court. It is an established rule that a plaintiff will not be allowed to take proceedings in this and another court at the same time for the same demand, and it matters not whether the other court be English or foreign; *Pieters v. Thompson*, (d) in which a plaintiff was suing in this court, and in one of the judiciary courts *at Amsterdam. Before decree a defendant has an [*210] easy remedy; he may obtain an order that the plaintiff may be put to his election, (e) which order stays proceedings in both courts; (g) but after decree, a defendant of necessity loses the benefit of this order, because the plaintiff has already made his election, and the decree has already decided the question between the parties; the plaintiff can then carry his case to another tribunal only by special leave of the court, first obtained for that purpose.

There is distinct authority for this application in *Mocher v. Reed*. There, after a decree for an account, the plaintiff proceeding at law for the same matter, was, at the instance of the defendant, restrained by injunction; Lord Manners observing, "After the plaintiff has obtained a decree to account, he is not at liberty to dismiss the bill; having got the relief he prayed, his election is made, and he cannot afterwards proceed at law; besides, how utterly inconsistent with the ends of justice it would be to permit him to proceed in this court and at law at the same time for the same demand; for the jury may find a verdict one way, and the Master make a report a different way, which would occasion such a clashing of jurisdiction as never could be endured."

This course was followed in *Wilson v. Wetherherd*. After a decree to account, an injunction was granted, on the application of the defendant, to restrain the plaintiff from proceeding at law in an action commenced by him pending the suit in equity.

The same principle was acted on in this court, in *Booth v. Leicester*, which was afterwards affirmed by the Lord *Chancellor; and [*211] there the plaintiff was restrained from prosecuting proceedings against the defendant in Ireland. So in *Harrison v. Gurney*, (h) The latter case and *Lord Portarlington v. Soulby*, (i) and *Bunbury v. Bunbury*, (k) show that the court has jurisdiction to restrain proceedings in a foreign court.[1]

(a) 2 Mer. 406.

(b) 1 Keen, 579, and 3 Mylne & C. 459.

(c) 1 Beavan, 171.

(d) Cooper, 294.

(e) See 1st General Order, (9th May, 1839,) 1 Beavan, ix.

(g) See *Carwick v. Young*, 2 Swan. 243.

(h) 1 Jacob & W. 563.

(i) 3 Myl. & K. 104.

(k) 1 Beavan, 318.

[1] Vide, 1 Keen, 580, n. 1; *The Marquis of Breadalbane v. The Marquis of Chandos*, 2 Myl. & Cr. 725; *Beckford v. Kemble*, 1 Sim. & Stu. 7, 16, n. (g); *Booth v. Leicester*, 1 Keen, 579; S. C. 3 Myl. & Cr. 549; 2 Story's Equity, §899, 900. The learned commentator on Equity Jurisprudence seems to restrict the jurisdiction of the court to cases in which both the parties, plaintiff and defendant, are resident within the *locus fori*. But is not the locality of the defendant sufficient,

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The proceedings in Scotland are founded on a false representation of what has taken place here: they represent a large sum to be due to the plaintiff; whereas, under a decree for an account, it cannot be known on which side a balance will be found due, until the accounts have been taken and the Master's report confirmed.

The proceeding itself is extremely harsh towards the defendant, as by the process of inhibition he is prevented from dealing with his property pending the suit, on a mere allegation of a claim for an unliquidated amount. If the plaintiff thinks fit to carry his case to Scotland, it ought to be decided there altogether; and the whole case might then be determined according to the Scotch law; the defendants might then, perhaps, avail themselves of defences under the Scotch law which they cannot have the benefit of in this country.

By the 6 G. 4, c. 120, s. 2, which regulates the form of proceedings in Scotland, the defendant is obliged to bring in all his defences together; he cannot demur or plead so as to bring the case to a single issue. In a cause of this magnitude, where all the documents are in the Master's office, it would be attended with the greatest inconvenience and oppression if the defendants were compelled to make their defence in Scotland, where the defence [*212] of *lis alibi pendens* would prevail, but could not be raised, except at an enormous and useless expense.

Mr. Pemberton and Mr. Koe, contra:—In *Wilson v. Wetherherd*, Sir William Grant expressed doubts as to the principle of the case of *Mocher v. Reed* and the recent case of *Brown v. Newall*, where all the authorities were examined, concludes this point, that it is not competent to a defendant to take active proceedings against a plaintiff so as to obtain an adverse order against him, unless he file a cross bill for that purpose. There are cases, it is true where the court has labored indirectly to make an adverse order against a plaintiff at the instance of a defendant; but it always repudiates the jurisdiction to do it directly. [The Master of the Rolls. The court has certainly shown some astuteness in making such orders; a case of that description was lately before me.(a)] The objections to the plaintiff's proceedings in Scotland are, first, the double vexation; and, secondly, that there may be inconsistent decisions, and it is to be seen whether the proceedings here taken are open to these objections.

The suit was instituted in this court, because the principal parties are resident here, and the books are here, and the transactions of the partnership were carried on here, consequently in this country alone can the accounts be taken; but the property out of which the demands of the plaintiff are to be satisfied happens to be in Scotland. By the law of Scotland, the plaintiffs have the power of securing what may ultimately be found due to them; and for

or it is upon him only that the injunction is to operate? and in general, a foreign plaintiff—in matters not affecting real estate—has an equal standing in our courts with our own citizens, except his liability to give security for costs.

(a) *Shepherd v. Morris*, 1 Beavan, 175.

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that purpose, and for that purpose only, are these proceedings taken in Scotland. The proceedings are not to establish the same demand, but are "auxiliary and in aid of the decree here, and only to secure the [*213] demands which may be established in this country; neither therefore, are the proceedings for the same purpose, nor can there be conflicting decisions. On what ground is the Scotch property to be withdrawn from the claims of the plaintiffs? This court has not the power of reaching the Scotch property, and therefore, of necessity, the plaintiffs must proceed in Scotland. Besides, it is most important that the plaintiffs should commence proceedings there, in order to prevent prescription running against them, by which their claims against the property of their debtors will be wholly defeated.

THE MASTER OF THE ROLLS (without hearing a reply) said, I am of opinion that, under the present state of circumstances, I ought to grant this application. The cases which have been cited of *Mocher v. Reed* and *Wilson v. Wetherherd*, and the case of *Booth v. Leycester*, as it was decided by the Lord Chancellor, (I say nothing of the other cases,) sufficiently determine that the court has jurisdiction to interfere in a case of this nature; and it is therefore reduced to this question, whether this is a proper case in which to exercise that jurisdiction? I do not mean to express any opinion whatever upon certain very important points which have been raised here—I do not mean to say, that a plaintiff can in no case, pending proceeding under a decree, be permitted to pursue any auxiliary remedy in a foreign country—I do not mean to say that he cannot avail himself in any case of the proceedings which may be adopted in a foreign country, for the purpose of attaching the property of his debtor, or of obtaining security there; nor do I say that, pending proceedings in the Master's office, he may not in any case be permitted to adopt proceedings in a foreign country, for the purpose of preventing a prescription running "there, which would deprive him [*214] of every remedy in that country. There may, I conceive, be special circumstances under which a party may be at liberty to proceed in a foreign country, for all or any of those purposes; but I am clearly of opinion that a party ought first to apply to this court for leave to adopt such proceedings, if special circumstances do exist, as if the defendants have no available property in this country, or the defendants in this country are insolvent, or, in short, if there are other reasons why the remedy should be pursued in another country. When these reasons are stated, the court will judge of them, but the rule of the court is, that there is not to be a double investigation of the same matter upon which the court is to adjudicate.[1] Without saying more upon the merits, I think that I ought to grant the present application, without prejudice, however, to any special application which, upon a statement of the circumstances warranting such proceedings, may be made

[1] Vide 1 Keen, 580, n. 1, where will be found an important extract from the opinion of Lord Cottenham on the appeal in this case.

1840.—Martin v. Drinkwater.

by the plaintiffs, for leave to adopt such proceedings, or to prosecute such suits in Scotland as they may be advised are proper and necessary for them.

I think that, at present, this application ought to be granted, with costs.(a)

[*215]

*MARTIN v. DRINKWATER.

1840: February 26.

A testator bequeathed to Mrs. L. Pitney an annuity of 150*l.*, payable half-yearly, for her separate use. He afterwards wrote in the margin opposite this bequest:—"Now, Mrs. J. Gray, one hundred guineas per annum, in quarterly payments." Mrs. L. Pitney had married a Mr. Gray, prior to the date of the will: Held, that the annuities were substitutional, and that the legatee was entitled to an annuity of 100 guineas for her separate use.

Extrinsic evidence is admissible to show the circumstances of the testator at the time of making his will, so as to enable the court to place itself in the situation of the testator; but it is inadmissible to prove either his motives or intentions.

THE question was, whether two annuities given by the will of the testator were, under the circumstances, cumulative or substitutional.

It appeared that the testator, E. P. Martin, by his will, dated the 16th of August, 1816, bequeathed as follows:—

"Now Mrs. Jane Gray, one hundred guineas per annum, in quarterly payments.—31st Dec. 1816."

"I give to Mrs. Louisa Pitney, of Marchmont Street, Brunswick Square, one annuity or clear yearly sum of 150*l.*, for and during the term of her natural life (in addition to 60*l.* per annum in the Imperial annuities, and the house which I gave to her some time ago,) which annuity of 150*l.*, I direct shall be paid to her *half-yearly*, the first half-yearly payment thereof to commence and be made at the end of six calendar months next after my decease, and shall not be subject to the debts, control, or engagements of any husband, but shall be paid into her own hands for her separate use, or to such person or persons as she shall, by writing under her hand appoint to receive the same; and her receipts alone, notwithstanding her coverture, or the receipts of the person or persons so to be appointed to receive the same, shall be sufficient discharges to my executors; and it is my will that she shall not sell, mortgage, or otherwise dispose of the same annuity, it being my intention to secure to her a permanent annual income; and if she shall attempt to sell, mortgage, or otherwise dispose of the same, it shall thenceforth cease and be no longer payable."

The marginal words were in the testator's hand-writing, and were proved in the Ecclesiastical Court as a testamentary writing. Janet Angus, under the name of Louisa Pitney, had cohabited with the testator until his mar-

(a) March 4th, 1840. On appeal, the Lord Chancellor affirmed the principle laid down by the Master of the Rolls; but on application being then made by the plaintiffs, his Lordship gave leave to the plaintiffs to proceed in Scotland, so far only as might be necessary to obtain security for what might be found due in this suit. Reported 4 Myl. & Cr. 585.

1840.—*Martin v Drinkwater.*

riage in 1808, when he made a provision for her; and in 1814 she married a Mr. Gray.

The testator died in 1818.

The question which now arose, upon exceptions to the Master's report, was, whether the two annuities of 140*l.* and of 100 guineas, bequeathed by the will and codicil of the testator, were cumulative or substitutional.

Mrs. Gray claimed the annuities for her separate use, and her husband claimed the annuity of 100 guineas, unaffected by that restriction: he also insisted that the annuity of 100 guineas was not given for life, but was a permanent annuity unlimited in duration.

The annuity of 100 guineas alone had been paid since the testator's death in 1818.

Some evidence was produced to show that, towards the close of the year 1816, the testator was informed that Mrs. Pitney had married a person named Gray, when the testator replied that she had acted very foolishly, and that she ought now to be maintained by her husband, or words to that effect. This evidence was objected to as inadmissible.

Mr. *Pemberton* and Mr. *Calvert*, for the residuary legatee, contended that the annuities were substitutional.

*Mr. *Kindersley* and Mr. *Blunt*, for Mrs. Gray, contended that the [*217] legacies, being given by two different instruments, being of unequal amount, and payable at different periods, were cumulative.[1]

Mr. *Tinney* and Mr. *Willcock*, for Mr. Gray, contended that the annuity of 100 guineas was not given to the wife's separate use, and belonged to the husband.

Mr. *G. Richards*, and Mr. *Stevens*, for the defendant Drinkwater.

The following authorities were cited: *Mackenzie v. Mackenzie*,(a) *Guy v. Sharp*,(b) *Hurst v. Beach*,(c) *Baillie v. Butterfield*,(d) *Campbell v. The Earl of Radnor*,(e) *Curry v. Pile*,(g) and 1 Roper on Legacies, 760.

THE MASTER OF THE ROLLS:—The question in this case arises on the construction of the will, and of a testamentary writing, which, having been proved as a codicil, must therefore be taken in connection with the will. The facts of the case are very short. It appears that the person who is now called Mrs. Jane Gray cohabited with the testator until his marriage, when he made a provision for her, which she was in the enjoyment of at the time he made his will. By his will, dated in August, 1816, he made the bequest in question; and in December following he wrote opposite the words "Pitney" in the will, this marginal note, which has been proved as a codicil:—

"Now Mrs. *Jane Gray, 100 guineas per annum, in quarterly pay- [*218] ments. 31st of December, 1816." Having been proved as a codicil,

(a) 2 Russ. 262.

(b) 1 Myl. & K. 589.

(c) 5 Mad. 351.

(d) 1 Cox, 392.

(e) 1 Bro. C. C. 271.

(g) 2 Bro. C. C. 225.

[1] Vide *Robley v. Robley*, ante 95; 2 Russ. 274, n. 2.

1839.—*Larkins v. Paxton.*

it has been argued that there are two distinct gifts bequeathed by two distinct instruments, and that the rule as to cumulative legacies must be applied to this case. If the instruments are to be taken separately, then undoubtedly the argument offered on behalf of the legatee would prevail; but I cannot so considered them, nor can I construe the latter words except with reference to their positions in the margin of this will, and by uniting them with the words contained in the body of the will; for what is the meaning of "Now Mrs. Jane Gray, 100 guineas, &c.?" Nothing can be made of these words unless we look at the opposite words in the will, namely, "Mrs. Louisa Pitney." When we are thus obliged to refer to the will, we must consider what is the meaning of the words of the codicil when introduced into the will. The will says, I give Mrs. Louisa Pitney an annuity of 100*l.*; and, introducing the words in the margin, the gift will stand, I give Mrs. Louisa Pitney, now Mrs. Jane Gray, 100 guineas per annum; thus constituting one gift only. I come to this conclusion without going into the matters of evidence which have been produced. I consider the rule as settled: you are at liberty to prove the circumstances of the testator, so far as to enable the court to place itself in the situation of the testator at the time of making his will, but you are not at liberty to prove either his motives or intentions.[1] There can be no doubt as to the rule on this point, and therefore, without reference to the evidence which has been produced, I consider that these words are incapable of any rational construction, except in connection with the words in the will; and it appears to me that the testator's object was to vary the legacy given by the will, and to convert it from an annuity of 150*l.*, payable half-
 [*219] yearly, into an annuity of 105*l.*, payable quarterly. I conceive also that the other limitations contained in the will respecting the annuity of 150*l.*, are now applicable to the substituted annuity of 105*l.*

LARKINS v. PAXTON.

1839: November 22.

In 1811, a creditors' suit was instituted by a simple contract creditor; the answers were got in in 1820, the plaintiff's debt was admitted, and thereupon the assets were brought into court; in 1823, another simple contract creditor obtained judgment against the executors, no decree was made in the cause until 1829: Held, that the judgment thus obtained had priority over all the simple contract debts.

THIS was a creditor's suit instituted to administer the estate of the testator, and was commenced by a simple contract creditor, in 1811.

The answers were not got in until 1820; the plaintiff's debt was admitted

[1] Vide *Colpoys v. Colpoys*, Jac. 451, 456, n. 1. *Boys v. Williams*, 2 Russ. & M. 689. S. C. 3 Sim. 563. *Irving v. De Kay*, 9 Paige, 528. *Rhodes v. Rudge*, 1 Sim. 68. *Benson v. Whittam*, 2 Sim. 493, 501, n. 1. *Parker v. Marchant*, 1 Yo. & Coll. C. C. 310. 2 Sim. & Stu. 150, n. 1; 153, n. 1.

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by the executors, and the fund was then paid into court ; no decree was, however, made until 1829.

In the mean time, and in Easter term 1823, a Mr. Theobald, a simple contract creditor of the testator, obtained judgment by confession against the executors for 1761*l.*: this sum exceeded the amount of assets, and the question was, whether the judgment debt was to have priority over the simple contract debts of the plaintiff and the other creditors of the testator, which were very considerable in amount.

Sir *W. Riddell*, for the plaintiff, contended that the judgment creditor had no such priority over the plaintiff and the simple contract creditors, the judgment having been obtained after the bill had been filed in this court, and after an admission by the executors of the plaintiff's debt.

In *Waters v. Ogden*, executors being sued, pleaded *plene administravit præter 4*l.** ; and another action being afterwards brought against them, they pleaded *plene administravit præter 4*l.** ; and as to that, that they had confessed assets to that amount in another action, this was held good ; so here, after the admission of the plaintiff's debt and assets, the executors might have resisted the action at law. He also cited *Morrice v. The Bank of England.*(a)

Mr. *Chandless*, contra, for the judgment creditor, was not called on by the court.

THE MASTER OF THE ROLLS:—I do not think I can deprive the creditor of the benefit of his judgment, looking at the circumstances. Here is a bill filed in the year 1811, the answers not got in until the year 1820, no decree obtained till the year 1829,—eighteen years from the time when the bill was filed, until the time when the decree was obtained, and no reason is suggested why there was all this delay, or why there was any difficulty in procuring the administration of the estate at an earlier period ; in the mean time a creditor brings an action, and in 1823 obtains judgment ; and the question is, whether I am to allow priority to the judgment so obtained, or whether I am, after the plaintiff's negligent and dilatory conduct of his suit, to deprive another party, who is a creditor, of the diligence he has used ? I think I cannot.

(a) 3 SWANS. 573 ; and Forrester, 217.

1840.—*Blease v. Burgh.*

[*221]

*BLEASE v. BURGH.

1840; March 11, 16.

A testatrix gave her residuary estate to trustees to accumulate, and to stand possessed thereof and of the accumulations, in trust for all the children of J. B., other than A., and to be paid on attaining twenty-three, with a gift over, in the event of the death of all the said children under twenty-three. J. B. had three children, A., B., and C., of whom A. and B. were born in the lifetime of the testatrix, and C. three years after her death. B. died an infant, and C., who was also B.'s personal representative, attained twenty-three: Held, first, that the legacy was vested; and the gift being to a class, and C. having come into *esse* before the period of distribution, the court considered that C. was not excluded from taking under the residuary gift, and that in his own right and as representing B. he was entitled to the whole fund.

A person may maintain a suit as sole plaintiff, though uniting in himself several characters, having distinct conflicting rights in the subject of a suit; but the court will not in a suit so constituted decide on the conflicting rights vested in the plaintiff, and by its decree will make provision for the protection of the defendants from any prejudice which may arise from the peculiar constitution of the suit.

A gift in terms importing a present vested interest with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives.

THE testatrix, Alice Savignac, by her will dated the 1st of July, 1805, gave the residue of her estate to trustees, on trust, to collect, sell and invest the same, and to invest and accumulate the interest thereof, and to stand possessed of the trust funds and all the accumulations thereof "in trust for all and every the child and children of her son John Blease by his wife Elizabeth, other than Thomas Seddon Blease, in equal parts, shares and proportions, if more than one, and if but one, then for such only one, and *to be paid*, assigned or transferred to him, her or them, being a son or sons, *on attaining the age of twenty-three years*; and being a daughter or daughters, at the like age of twenty-three years or day or days of marriage, which should first happen; and in the event of the death of any or either of such children, being a son or sons, under the said age of twenty-three years, or being a daughter or daughters, under the like age, and without having been married, then the part or share, or parts or shares, of him, her, or them so dying to be paid, assigned, or transferred to the survivor or survivors of them; and in case all the said children of her said son John Blease, other than and except the said Thomas Seddon Blease, should die under [*222] the said age of twenty-three years, *being a son or sons, or the like age or day or days of marriage, being a daughter or daughters, then, upon trust, to pay, assign or transfer such stocks, funds or securities in or upon which the rest, residue and remainder of the estate, property and effects should or might be invested, and all accumulations thereof, unto her said grandson Thomas Seddon Blease, on attaining his said age of twenty-three years; and in case of his death under such age of twenty-three years, as well as all the other children of her said son John Blease under the age of twenty-three years, being a son or sons, and under the like age and without having been married, being a daughter or daughters, then, upon trust,

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from and after the death of the survivor of all her said grand-children, the children of her said son by his present wife," for her son John Blease for life, with remainder, as to one moiety, for James Burgh, if living, or his children, if dead; and as to the other moiety, for her nephew and niece, James Chapman and Mary Bowker.

In a former clause in the will, which was commented on in argument, the testatrix gave 1000*l.* to trustees, in trust, to invest and stand possessed thereof in trust for her grandson T. S. Blease, to be paid on his attaining twenty-three years, together with all accumulations which she directed to be made, and that no rents should be applied in maintenance during minority, unless there should be an absolute necessity; and in case of his death before he should attain twenty-three, she directed the 1000*l.* and accumulations to become part of the residue.

The will contained no power for the maintenance or advancement of the children of John Blease. The testatrix died in August, 1805.

John Blease, the son of the testatrix, had three children; namely, [*223] Thomas Seddon Blease, born in 1801; John Blease the younger, born on the 25th of July, 1805, after the date of the will; and the plaintiff, Alfred Whitten Blease, born in 1808, three years after the death of the testatrix.

John Blease the younger died in November, 1812, aged seven years, and the plaintiff was his legal personal representative.

Thomas Seddon Blease died in December, 1812, being of the age of eleven years; but his legal personal representative was not a party to this suit.

In December, 1831, the plaintiff Alfred W. Blease attained his age of twenty-three years.

The first question was, whether the gift of the residue to the children of John Blease the elder was vested; and, secondly, whether the plaintiff, who was born after the death of the testatrix, was to be considered one of the children entitled to take.

Mr. *Spence* and Mr. *Spurrier*, for the plaintiff, Alfred Whitten Blease, contended that he was entitled to the whole residue, either to his own right, or in the right of his brother John Blease, of whom he was the administrator.

That the gift to the children was vested, the enjoyment being alone postponed, and that there was nothing in the will to divest it.

Mr. *Pemberton* and Mr. *G. Turner*, contra, contended that, in the present state of the pleadings, no decree could be made, for the plaintiff claimed in two "inconsistent characters, first, in his own right, and [*224] secondly, in right of his deceased brother; that the case was like that of *Cholmondeley v. Clinton*,^(a) where two persons having inconsistent titles, entered into an arrangement respecting their rights between themselves, and then filed a bill together as co-plaintiffs, it was held that such a bill could not be sustained; that here, the mode of account by the defendant would depend

(a) *Turner & R.* 117.

1840.—*Blease v. Burgh.*

on which of the titles of the plaintiff prevailed, and that such titles could not be determined in a suit in which the only party representing them was plaintiff; that if the defendant had a settled account with the deceased brother, he would be entitled to set it up in bar, on the footing of the brother's right; but if such settled account existed with the plaintiff, then the defendant would be entitled to the benefit of such settled account in the event only of the plaintiff succeeding in this suit in his own right.

On the construction of the will, they contended that the residuary gift either vested at the death of the testatrix or on the legatee attaining twenty-three: that, in the former case, the gift over would be good, and the parties in remainder entitled; in the latter, the gift would be void, as too remote; so that the plaintiff would not, in either case, have any title to maintain the suit; *Davidson v. Dallas*,^(a) *Scott v. Harwood*,^(b) *Judd v. Judd*,^(c) *Hunter v. Judd*,^(d) *Vawdry v. Geddes*,^(e) *Bland v. Williams*,^(g) *Porter v. Fox*,^(h) *Farmer v. Francis*; ⁽ⁱ⁾ and see *Palmer v. Holford*,^(k) *Leuke v. Robinson*,^(l) *Bull v. Pritchard*.^(m)

[*225] Mr. *E. R. Daniel*, for the next of kin of the testatrix, contended that the gift was void for remoteness; that the plaintiff, who was unborn at the death of the testatrix, could not take; and that, at least, the accumulations subsequent to 1826, were void under the Thellusson act, and belonged to the next of kin; *Haley v. Bannister*,⁽ⁿ⁾ *Eyre v. Marsden*.^(o)

Mr. *Spence*, in reply, contended that this was not like the case of *Cholmondeley v. Clinton*, where two persons having two inconsistent titles, joined as co-plaintiffs, and consequently occasioned a *misjoinder*; but was a case where, from circumstances, one individual had vested in himself several distinct claims. That *Scott v. Harwood* was a decision on real estate only. That as to the accumulations beyond twenty-one years, the parties, having vested interests, had, but for their infancy, the power of receiving the residue and of preventing any further accumulations.

March 16.—THE MASTER OF THE ROLLS:—The first question in this cause was, whether the interests which the testatrix, Alice Savignac, intended to give in her residuary estate to the children of her son John Blease, became vested at the time of her death.

At that time John Blease had two children only, namely, Thomas Seddon Blease, and John Blease the younger; and by her will, which was made before the birth of John Blease the younger, she gave the residue of her estate, &c., in the terms which have been stated.

The words in which this trust is declared, taken by themselves, [*226] import a present gift, with a direction to pay "at a future time, and

(a) 14 Ves. 576.

(d) 4 Simons, 455.

(k) 6 Sim. 485.

(l) 2 Mer. 363.

(o) 2 Keen, 564. [4 Myl. & Cr. 231.]

(b) 5 Mad. 332.

(e) 1 Russ. & Myl. 203.

(i) 2 Sim. & St. 505.

(m) 1 Russ. 213.

(c) 3 Simons, 525.

(g) 3 Myl. & K. 411.

(h) 4 Russ. 403.

(n) 4 Madd 275.

1840.—Blease v. Burgh.

an immediate vested interest in the children of John Blease, answering the description at the time of the testatrix's death; but it is truly observed that the question depends on the intention of the testatrix, which is to be collected from the whole will; and it is argued for the defendants, that upon the whole will it appears to have been the intention of the testatrix that her residuary estate should not vest in the children of her son John Blease, unless they attained the age of twenty-three years, and that consequently the gift is void as being too remote.

There is, indeed, a delay of payment to the children of John Blease without any intermediate interest being given to any other person, and without any provision being made for the intermediate maintenance or benefit of the only persons to take; and the subject of the gift is an aggregate consisting of the residue and of the accumulations of interest to be continued up to the period of distribution, and not ascertained or ascertainable till then; and besides, there are gifts over in the event of the children dying under the age of twenty-three years.

But it does not appear to me that a gift in terms which import a present vested interest, with a postponed time of payment, is made contingent by a direction to accumulate till the time of payment arrives; and I think that a gift over, which is too remote and void, as is the case here, cannot defeat the vested interest previously given; and on a consideration of these and other parts of the will, it appears to me, that the gift of the residue vested in the children of John who were entitled to take.[1]

*There was only one such child at the time of the testatrix's death; [*227] and the next question is, whether the plaintiff, Alfred Blease, who was born between three and four years afterwards, is to be considered as one of the children entitled to take. As between the plaintiff and any person who may have claims upon, or any interest in, the estate of John Blease the younger, who died at seven years of age, that question cannot be now decided; the plaintiff cannot maintain arguments for and against himself, in different characters. The next of kin of John Blease the younger, have not been ascertained; and there is no legal personal representative of Thomas Seddon Blease, who seems to have been one of them: I incline to think, however, that there being in this case a general description of a class, and as it appears to me, vested interests given, but a postponed time of payment, and another child born before the period of distribution, that the plaintiff is

[1] Vide 2 Sim. & Stu. 508, n. 2. 2 Russ. & M. 208, n. 3. *Bland v. Williams*, 3 Myl. & K. 411. *Saunders v. Vautier*, Cr. & Ph. 240. *Wood v. Cone*, 7 Paige, 472. *Birdsall v. Hewlett*, 1 Paige, 32. *Stokes v. Holden*, 1 Keen, 145. *Snow v. Poulden*, id. 186. *Virian v. Mills*, 1 Beav. 315. *Lucas v. Carline*, post, 367. *Whitting v. Force*, post, 571. *Newman v. Newman*, 10 Sim. 51. *Murray v. Tancred*, id. 465. *Watson v. Hayes*, 9 Sim. 500, 501, n. 2. S. C. 5 Myl. & Cr. 125. *Griffith v. Blunt*, 4 Beav. 248. *Lister v. Bradley*, 1 Hare, 10. *Leeming v. Sherratt*, 2 Hare, 17, 18, 21. *Marsh v. Wheeler*, 2 Edw. Ch. Rep. 156. *Drake v. Pell*, 3 Edw. Ch. Rep. 267, 268. *Marr's Ex'r v. McCulloch's Adm'r*, 6 Porter's (Ala.) Rep. 507. *Perry v. Rhodes*, 2 Murphy's No. Car.) Rep. 140.

1839 —In re the Royston School.

let in to claim a share in his own right ; and care being taken to avoid any prejudice to the defendant, the accounting party, I think, that notwithstanding some objections, he may have relief in this cause. I propose to declare, that the plaintiff and John Blease, junior, being the only children of John Blease the son of the testatrix, by Elizabeth his wife, and the plaintiff being the legal personal representative of the said John Blease the younger, deceased, the plaintiff is entitled to the residuary estate of the testatrix Alice Savignac. Refer it to the Master to take the usual accounts of her estate possessed by her executor, &c., &c. In taking such accounts, let the executor have credit for all sums properly paid by him for the maintenance and education of Thomas Seddon Blease, pursuant to the direction of the will, and have all just allowances against the plaintiff, and against the estate of John Blease the younger ; and let the clear residue of the said testatrix's [*228] estate be ascertained, and let the *Master inquire and state how much residue has been applied and disposed of, and what would have been produced thereby, if the same had been increased and accumulated, according to the directions of the will, up to the 16th of August, 1826.

IN RE THE ROYSTON FREE GRAMMAR SCHOOL.

1839 ; August 10.

The trustees of a free grammar school, whose origin did not appear, held property "to the use of the school." Having elected a school-master, they obliged him to enter into a bond and agreement, stipulating that he should not have or claim a freehold in the school, or estates ; and should quit at six months' notice, and should not intermeddle with the estates, and certain other stipulations as to the government and management of the school : Held, that the trustees had exceeded their powers.

THE origin of this grammar school did not appear, but it was stated that "the yearly sum of 46*l.* 1*l*s. was payable to the master of the school as wages, or in part of his salary, out of the revenues of the duchy of Lancaster, and a house and twelve acres of land were held by the trustees under the manor of Pontefract, subject to a rent of 1*l.* 4*s.* 8*d.*, by virtue of a grant from King James the First, "to the use of the school in Royston for ever," according to the institution in the letters patent, expressed and declared, to hold of the king and his successors, rendering the rent aforesaid.

A petition was presented under the authority of Sir Samuel Romilly's act,^(a) by the Rev. Wm. Wordsworth and Mr. George Treble, two of the inhabitants of the parish, praying a reference to the Master to approve of a proper scheme for the administration of this charity, and the revenues thereof, and for the conducting and management of the said school, and letting and improving the school estates, and the due application of the

(a) 52 G. 3, c. 101.

1839.—In re the Royston School.

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Amongst several grounds of complaint, it was stated that, in the year 1837, Mr. Thomas Howard was appointed school-master, and thereupon he with a surety entered into a bond to the then trustees, in the penalty of 200*l.*, for the performance of the covenants and conditions contained in certain articles of agreement of even date, and made between the trustees of the one part, and Thomas Howard of the other part; whereby, after reciting "that the said Thomas Howard had been duly elected and chosen master of the said school, upon the terms and conditions, and subject to the rules and regulations therein stated, Thomas Howard did thereby covenant with the trustees, to attend, conduct, and govern the school for the term of one year, and forward from year to year until six calendar months' notice in writing should be given by the trustees, or a majority of them, as at the end of the first or any subsequent year, to vacate the agreement. And the agreement contained various minute regulations and stipulations as to the government and management of the school; and that the master should occupy the school and school-house, and reside in the latter during his remaining master of the school, and keep the same in good tenantable repair and condition, and pay and discharge all rates and assessments in respect thereof, and should quit and deliver up the school and school-house upon six calendar months' notice, at the end or expiration of such year, in tenantable repair and condition, and thenceforth cease to be master of the school, and certain other terms as to the master's quitting; and that Thomas Howard should not, in consequence of his election of master, have or claim any freehold in the aforesaid school and school-house, and school estate, or *any part [230] thereof; and that nothing contained in the said agreement should extend, or be construed to extend, to any other part of the trust estate than the aforesaid school and school-house with the appurtenances; and that Thomas Howard would not, at any time, intermeddle or otherwise interfere with the other part of the estate, nor with the rents and profits thereof, but that the trustees for the time being should have the full exclusive power and entire management and control thereof; and the said trustees, in consideration of the premises, and in case the said Thomas Howard should, in every respect, fulfil and keep the aforesaid rules and regulations and stipulations, thereby agreed to pay and allow to him the yearly sum of 50*l.* for the first three years, and the yearly sum of 75*l.* for each and every succeeding year, by two half yearly payments on the days therein mentioned."

In the affidavit filed on behalf of the trustees, who were the respondents, it was stated, "that they had served Mr. Howard with a notice to discontinue the office and duties of school-master, because the trustees were dissatisfied with his conduct; and because he had not procured a surety for the performance of his agreement; and because he refused to reside in the school-house; and because he refused to allow the trustees and their examiners to

 1839 —In re the Royston School.

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 1839.—In re the Royston School.

examine the scholars at the times mentioned in the agreement, in a room in the school-house; and because the said Thomas Howard did not, in other respects, conform to the terms of the agreement; and because said trustees deemed it essential to the good government of the school and estate that the master should in all respects conform thereto."

Mr. *Pemberton* and Mr. *Rogers*, in support of the petition, con-
 [*231] tended, that the trustees had no right to "impose on the school-master, on his appointment, the terms of his giving a bond to perform these conditions. That such an act was altogether an illegal assumption, on the part of the trustees, of a visitatorial power which was vested in the Crown, and was an attempt to exclude the jurisdiction of this court. That the school-master had a freehold, both in his office and in the estates, which the trustees could not by this mode of dealing deprive him of. [THE MASTER OF THE ROLLS. The estates are held "to the use of the school," and not to the use of the school-master.] That the grounds stated by the trustees were not sufficient to justify his removal; and further, that the school-master had a right to the whole revenue after keeping the school in repair, and that the trustees had no power to limit his salary.

Mr. *Kindersley* and Mr. *Jemmett*, contra, contended that no case had been made out to justify the interference of the court; that the inhabitants, except the petitioners and the school-master, were satisfied with the conduct of the trustees, and that they had acted rightly in securing the proper performance of his duties by the school-master, by stipulations which were evidently beneficial to the charity, and necessary for that purpose.

THE MASTER OF THE ROLLS said that there was a great deal of unnecessary complaint in this petition, and he must refuse the principal part of the prayer. That though it might be very proper that many of the regulations imposed by the trustees should be observed under their order and direction, yet that it was not proper to enforce them in the way which they had done by taking a bond from the school-master. That the trustees had exceeded their powers though they had intended what was perfectly right; that he
 [*232] could not dismiss the petition, but must refer it to the Master to "approve of a proper scheme for the management of the school.(a)

(a) A petition of appeal was presented to the Lord Chancellor by the trustees, which was dismissed on the 24th of April, 1840, on the ground that the act of parliament of the 52 G. 3, c. 101, precludes an appeal from the Master of the Rolls to the Lord Chancellor.

NOTE.—The jurisdiction of the court in cases relating to schools has been considerably extended by the 3 & 4 Viet. c. 77.

1839.—*Smkh v. The Earl of Effingham.*

SMITH v. THE EARL OF EFFINGHAM.

1839: August 2.

The priorities of encumbrancers upon an estate were declared, and a receiver appointed, with directions to keep down the incumbrances in a suit to which the first incumbrancer was not a party. The first incumbrancer filed a bill against the receiver and the several parties to the former suit, to establish his priority, and praying "that if necessary the second bill might be taken as supplemental to the first." The plaintiff in the second suit moved for an injunction to restrain the receiver from making any further payments to the other incumbrancers: Held irregular, and that he ought to have applied in the first suit for leave to enforce his legal remedies: Held also, that the court would not on this occasion determine whether this was to be taken as a supplemental bill.

In 1817 Mr. Primrose, who possessed real estate in Norfolk, granted the plaintiff a personal annuity of 380*l.* a year, which was further secured by a warrant of attorney, on which, in the same year, judgment was entered up and docketed. The annuity falling into arrear, the plaintiff sued out an *elegit*, and took some proceedings thereunder, and brought an action of ejectment in order to obtain possession of the Norfolk property, which he was prevented doing, as he alleged, by an outstanding term. In the mean time, and in December, 1818, Mr. Primrose granted an annuity to a Mr. Brown, and secured it on his real estates by a demise thereof to a trustee for ninety-nine years; and subsequently to 1818 he granted several other annuities to persons named Waite, Pearson, and Brydges.

A trust deed was executed in 1821, by Mr. Primrose to the Earl of Effingham, and other persons on certain *trusts for his creditors, [*233] which trusts were unknown to the plaintiff; the trustees entered into possession.

In 1829 Brydges, the last annuitant, filed his bill in this court against the other annuitants and the trustees under the creditors' deed of 1821, but omitted all mention of the plaintiff and his security; and, in effect, he sought to have the several incumbrances paid out of the estate of Mr. Primrose. In this suit of *Brydges v. Brown* the priorities of the several incumbrancers (omitting the plaintiff) were declared, and the accounts of the receipts of the trustees of the creditors'-deed were directed to be taken; the accounts were accordingly taken, and a receiver was appointed in that suit, who was directed to keep down the incumbrances according to the declared priorities.

In 1839, the plaintiff filed this bill against the parties in the other suit, and their representatives, and against the receiver, alleging that he had been ignorant of these proceedings, that the parties to the other suit had notice of his claim, but had fraudulently omitted making him party to their suit, and that he was prevented having the benefit of his judgment by reason of the outstanding term: and he prayed that he might be declared first incumbrancer on the premises,—for payment of the arrears thereout, and that the receiver might pay over the balance in hand, and might be restrained from making any further payments unto the defendants; "and that, if necessary, this bill

 1839.—Smith v. The Earl of Effingham.

might be taken to be a bill in the nature of a bill of review of, or of a bill supplemental to" the former cause.

Mr. *Pemberton* and Mr. *Willcock* now moved, on behalf of the plaintiff, in the second suit only, for an injunction restraining the receiver from [*234] making any further *payments to any of the defendants until further order. They contended that the plaintiff, the first incumbrancer who had been purposely omitted from the previous suit, had now a right to prevent further payments being made to his prejudice to the subsequent incumbrancers. They cited *Lewis v. Lord Zouche*,^(a) where a judgment creditor filed a bill against the owner of the estate and the receiver in another suit who had been ordered to keep down the previous incumbrances, and it was held regular, and, on motion, the receiver was ordered to pay the surplus into court in the second suit.

Mr. *Kindersley* and Mr. *Parry*, for the Earl of Effingham and other defendants.

Mr. *Treslove* and Mr. *Piggott*, for Brown, contended, that this application for an injunction against an officer of the Court was irregular; that it was also irregular to make it in a different suit from that in which the receiver had been appointed; that the outstanding term stated in the pleading was subsequent in date to the judgment, and therefore did not affect it; that there was therefore no impediment to the plaintiff's recovering at law; and that the plaintiff ought to have obtained the usual order in the other suit to be examined *pro interesse suo* before the Master.

They also suggested that the plaintiff's security was usurious: they cited *Berney v. Sewell*.^(b)

Mr. *Pemberton*, in reply, contended, that from the frame of the prayer, this suit must be considered supplemental to the former, and that the application was consequently regular.

[*235] THE MASTER OF THE ROLLS:—It appears to me that this motion is incorrect in point of form.

The plaintiff is a creditor, by *elegit*, of Mr. Primrose, and I do not find that there are any obstacles which prevent his proceeding to enforce his remedy at law except these,—first, it is alleged that there is an outstanding term, and secondly, that a receiver has been appointed in the other suit. If the appointment of the receiver were the only obstacle, the proper remedy would be for the party to ask leave in the other suit to enforce his legal remedies, and not to apply for an injunction in a different suit.

With respect to the outstanding term, it does appear from some statement which has been made at the bar, that there is an outstanding term prior to the judgment under which the plaintiff claims; but then it clearly appears that this is not the outstanding term stated in the bill, which appears to be subsequent to the judgment, and the prior term is not therefore the one alleged against the defendants in this case, and they have not had the opportunity of

(a) 2 Sim. 388.

(b) 1 Jacob & Walker, 647.

 1839.—Eaton v. Smith.

meeting it. In this state of things, it does not appear on the record as it stands, that the plaintiffs are entitled to the relief now asked. It is said that this bill may be considered as supplemental to the other suit, as it prays "that *if necessary* it may be taken to be a bill in the nature of a bill of review of, or of a bill supplemental to" the other cause. No doubt the court must some time or other determine this point, when all the parties are here; but it is not a question to be determined now or to be assumed on this occasion in favor of the plaintiff; the case, therefore, amounts to this, that an *elegit* creditor comes to stay the execution of an order in another suit. I will not say "that this plaintiff may not be ultimately entitled to the relief he [236] asks, nor can I, in the present state of the case, enter into the question of usury, but I think that this motion is irregular, and must be refused with costs.[1]"

 HASLER v. HOLLIS.

1840 : November 2.

[What a notice of motion for liberty to file a supplemental answer should state.]

THE MASTER OF THE ROLLS, in this case, stated his opinion that a notice of motion for liberty to file a supplemental answer should specify the new facts intended to be introduced, and that a notice of motion for liberty to file a supplemental answer, stating "*certain facts*," was not regular.[2]

Mr. Pemberton for the motion.

 EATON v. SMITH.

1839 : November 11.

A testator gave his residuary property to two trustees for his children, except John who had misconducted himself; but the testator trusted his conduct would change, and he gave *his trustees and the survivors of them*, and the executors and administrators of such survivor, power to give to John an equal share with his brothers and sisters. He appointed the two trustees executors, and by a codicil appointed a third-executor; one alone proved the will, and the others renounced. In a state of facts brought into the Master's office, the sole executor and trustee stated that John had conducted himself to his satisfaction, and in such a manner as to entitle him to an equal share: Held, that the sole executor had power to appoint, and had well appointed a share to John.

THE testator gave his personal estate to Robert Smith and William Baker, upon trust to sell and get in, and stand possessed thereof in trust for

[1] That an injunction may be granted to stay proceedings in another suit pending in this court, see *Crawford v. Fisher*, 10 Sim. 479.

[2] That a supplemental answer cannot be filed without leave; what the order granting permission should state, and upon what terms it is granted; see *Hughes v. Bloomer*, 9 Paige, 269. *Boeswell v. Tucker*, 2 Keen, 189, and n. 1, id. *Jackson v. Parish*, 2 Sim 505, 509, n. 1. *Barnes v. Tweedle*, 10 Sim. 481. A supplemental answer cannot be excepted to without leave. *Barnes v. Tweedle*, *ubi sup.*

1839.—Eaton v. Smith.

[*237] his children *(except John.) He then proceeded to say that the name of his son John Eaton had been purposely omitted in consequence of his misconduct, and he "therefore left him the sum of 5*l.*; but in the hope that his conduct as he advanced in years might change, and that he would behave and demean himself towards his brothers and sisters with that kind affection and tenderness which was due to them, and with respect towards his (the testator's) executors and trustees thereinbefore named, he thereby gave and granted unto his said trustees, and the survivors of them, and the executors and administrators of such survivor, full power and authority to permit his son John to have an equal share of his said estate and effects with his brothers and sisters."

By a codicil, the testator appointed William Monsdale "to be an executor of his said will jointly with Robert Smith and William Baker therein named."

On the testator's death Baker renounced and Monsdale declined proving, whereupon the testator's will was proved by Robert Smith alone, power being reserved to Monsdale, in the usual way, to come in and prove. A bill having been filed for the administration of the testator's estate, the business of the testator was carried on under the sanction of the court, authority for which was given to the trustees by the will. The testator's sons John and George superintended the management of the business, and had an allowance made them by the court for their trouble.

In a report of the Master, dated January, 1828, he certified that a state of facts had been brought in by Robert Smith, the only acting executor of the will of the testator, which stated as follows:—"That the said

[*238] *business so carried on under the superintendence of the said defendant John Eaton had been conducted by the said defendant to the satisfaction of him the said Robert Smith, and to great advantage; and that the said John Eaton had in all respects demeaned and conducted himself so well and properly, and in such manner to merit the confidence of the said Robert Smith and so as to entitle him the said John Eaton to an equal share of the said testator's estate and effects, with his said brothers and sisters." Robert Smith had made to John Eaton advances on account of his share of the testator's estate, but no formal admission had been made by Robert Smith, permitting him to have an equal share with his brothers and sisters.

In September, 1829, John Eaton died.

The cause now came on for further directions, and the question was, whether John Eaton was entitled to an equal share in the testator's estate with his brother and sisters.

William Baker was stated to be dead and William Monsdale to be living.

Mr. *Tinney* and Mr. *Girdlestone*, for the plaintiffs, the other children of the testator, contended that the power given to the trustees could not be executed by Smith alone, that this was a personal discretion given by the testator to his trustees which could not be executed by the court or the acting

 1839.—*Nelson v. Bridges.*

trustee alone. [THE MASTER OF THE ROLLS. Can that be so? The authority is given to the trustees and the survivor of them, and the executors and administrators of the survivor.] Here neither the trustees nor the survivors, nor the executors nor administrators of the survivor have *executed the power: besides this, the object of the discretion is [*239] dead, and the power is therefore terminated.

Mr. *Kindersley* and Mr. *J. Moore*, for the executors, and,

Mr. *J. Campbell*, for the representatives of *J. Eaton*, were not heard by

THE MASTER OF THE ROLLS, who said that the intention of the testator was clearly that his son *John* should have the opportunity of redeeming himself by his after good conduct, and which it was clear he had done to the satisfaction of Mr. *Smith*, the acting trustee; and that under the circumstances he must hold that *Smith* had approved of his conduct, and had executed the power which was vested in him, and that the representatives of *John Eaton* were therefore entitled.[1]

NELSON v. BRIDGES.

1839: November 15.

Remedy by supplemental bill, after a decree for specific performance, for the damages occasioned to the plaintiff by the abstraction by the defendant, *pendente lite*, of part of the subject-matter of the suit.

IN February, 1833, the defendant *Bridges* entered into a verbal contract by which he agreed to grant to the plaintiff, *Nelson*, the right of raising the stone under a plot of 1026 square yards of his land at a fixed rent per yard; the plaintiff entered and part performed his agreement, but *Bridges* disregarding this arrangement, in the following year agreed to let the same land to the defendant *Woodward* for similar purposes, and he brought an action of ejectment against the plaintiff to turn him out of possession.

In June, 1834, the plaintiff filed his bill against *Bridges* and *Woodward* for a specific performance of *the agreement, and for an injunction to restrain the action at law. [*240]

The plaintiff had been prevented applying to the court for an injunction to restrain the action at law in consequence of the case stated by the defendant's answer; the result was, that the action proceeded and the defendant *Bridges* recovered possession of the land in May, 1835, upon which *Woodward* entered and commenced working a considerable portion of the quarry; and in April, 1837, a decree for a specific performance was pronounced.

The plaintiff, in 1838, filed a supplemental bill against *Bridges* and *Wood-*

[1] Vide *Davous v. Fanning*, 2 Johns. Ch. Rep. 25?.

1839.—*Nelson v. Bridges.*

ward, stating these facts and praying for a reference to the Master to ascertain the amount of the loss and damage sustained by the plaintiff by the conduct of the defendants in the bill set forth, and that the amount might be paid to the plaintiff by the defendants. The case now came on for hearing.

Mr. *Pemberton* and Mr. *Elmsley*, for the plaintiff, contended that the relief now asked was merely consequent on the relief granted by the original decree; that from the additional circumstances having taken place pending the suit they could not be then brought before the court upon the original bill.

That the plaintiff after the decree in equity had no more than an equitable right, and that a court of law would not take cognizance of the fact of the part performance of the agreement so as to take the case out of the statute of frauds; that as the plaintiff could not maintain an action at law for damages, he was entitled to apply to this court for equitable relief.

[*241] *Mr. *Richards* and Mr. *L. Wigram*, contra:—This is a mere suit for damages which the court will not entertain, the proper remedy being by an action at law, it being the legitimate province of a jury only to assess damages. If the agreement had been in writing the plaintiff might have originally proceeded at law for damages, and, after the decree for specific performance which declared that the plaintiff was entitled to the specific performance of the agreement for a license to get stone and referred it to the Master to settle the terms of the license, the plaintiff might have perfected the decree and obtained the license, which would have been antedated, and he might then have brought his action at law. In a recent case before the Lord Chancellor of *Mundy v. Joliffe*,^(a) which was a suit for the specific performance of an agreement for a lease, the term agreed to be granted expired before the decree was pronounced, and the Lord Chancellor directed the lease to be antedated in order to give the plaintiff a remedy on the covenants on the very ground that damages could not be obtained in equity. If this had been done in the present case, Woodward would be treated as a mere trespasser, and an action at law would lie against him. As to Bridges, he has received no part of the profits of the stone which has been worked, he is not therefore answerable in this suit. This is not a suit for an account of the profits received by the defendants, but expressly asks for a reference to the Master to ascertain the damage sustained by the plaintiff.

The plaintiff is also barred by his acquiescence in granting to Woodward a right of way over his land from the quarry to enable him to work it.

[*242] *Mr. *Pemberton*, in reply:—What is now asked on behalf of the plaintiff is merely incidental to the original relief, and which he could not obtain at the first hearing because the facts took place pending the suit and could only have been brought forward by supplemental bill. If these facts had been known at the former hearing the decree would have been for a specific performance of the agree-

(a) Nov. 5th and Dec. 24th, 1839.

1839.—*Nelson v. Bridges.*

ment with an inquiry as to the injury sustained up to that time; this case therefore is not like a bill for damages, but is supplemental to the decree pronounced. In a case in which the court entertains jurisdiction, the whole relief must be had here, and a party would not be allowed to obtain part of his remedy here and part in a court of law. In the present case the court has assumed an equitable jurisdiction, and the plaintiff is, therefore, entitled to be recompensed for the loss he has sustained to be ascertained by means of a reference to the Master. If the subject of the agreement had been land, the plaintiff would have been entitled, as of course, to an account of the rents and profits: here the profits are not the rent, but the loss from the abstraction of the stone, which the Master can as easily ascertain. The court frequently refers it to the Master to inquire into the amount of damages, as in *Denton v. Stewart*;(a) so in the cases of an alleged trespass by an officer of the court where the court will not permit an action at law to proceed, but refers it to the Master to settle the amount of damages.(b)

THE MASTER OF THE ROLLS:—It has already been declared that the plaintiff is entitled to a specific performance of the agreement; but *pending the proceedings, the very subject of the agreement, to which [*243] the plaintiff has by the decree been declared entitled, has been abstracted. The stone, or a quantity of the stone, which the plaintiff had obtained a license to quarry, has actually been taken away by the defendant Wordsworth, so that, while the performance of the agreement has been resisted and delayed by the defendants, they, or one of them at least, has taken away a portion of the very subject matter of the suit, and the plaintiff has been thereby for ever deprived of the full benefit of his contract. If that circumstance had been known at the first hearing, I cannot have the least doubt but that the court would, in the exercise of its jurisdiction, have put in a due course of investigation the question of the amount of compensation which ought to be made to the plaintiff. This matter, it appears, was not brought to the attention of the court at that time, and a supplemental bill is now filed by the plaintiff for the purpose of obtaining compensation.[1] It is said that such compensation might originally have been had at law, or, if not, that at least it might have been obtained at law by perfecting the decree for the specific performance of the agreement in some particular form. I am of opinion that it

(a) 1 Cox, 258.

(b) See *Chalie v. Pickering*, 1 Keen, 749, and the cases there cited.

[1] As to a supplemental bill to carry into effect a decree, see further *Hodson v. Ball*, 1 Phillips, 177. In that case (p. 180,) Ld. Lyndhurst says; "Now there is no doubt of the correctness of that position, [viz. that a supplemental bill may be filed in aid of a decree in order that it may be carried fully into execution,] but the question is, what is the province of a supplemental bill in aid of a decree? I apprehend that a supplemental bill in aid of a decree cannot vary the principle of the decree. Its province is, to carry out the principle of the decree; to give full and complete effect to the decree, as it exists. The instance that is generally given of a supplemental bill in aid of a decree is of this description—where there has been a decree to account, but directions have not been sufficiently given as to the manner of accounting, and a further decree is therefore required for the purpose of supplying this defect, that is, of carrying into full effect the original decree."

1839.—*Stead v. Nelson.*

is not necessary for this court when it has once entertained jurisdiction in a case to resort to that circuitous mode of giving relief; [2] I think, moreover that if this matter had been before the court at the first hearing, it would have been put in a proper train of investigation. Under these circumstances therefore it appears to me that the plaintiff is now entitled to relief, but the form in which that relief is to be given is certainly a matter of very serious consideration. I think that the amount of what is due to the plaintiff ought to be ascertained by means of an action at law, and I do not clearly see how it can be satisfactorily done in any other way. In this, and perhaps

[*244] "in all other cases, the profit made by the defendant is not the measure of the damages done to the plaintiff, for we find that the quarry was not worked in a way to make the most of it; Mr. Bridges, thinking the validity of the license which he had given to Wordsworth to be doubtful, discouraged his working it pending the proceedings, so that Wordsworth took only that stone which it was convenient for him to take and he did not therefore work it in the profitable way in which the plaintiff would have worked it. It appears to me that the defendants are correct when they say that this is a case of damages and not of account, because it is to recover something which cannot be ascertained by taking an account of the profits made,—it is to ascertain the amount of the loss which the plaintiff has sustained by being prevented doing that which it has been declared he was entitled to do. I think the proper mode of assessing the amount of the damage will be to require the defendants to admit such facts as are necessary, and to allow the plaintiff to bring an action to ascertain *quantum damnificatus*(a).

[*245]

*STEAD v. NELSON.

1839: November 18.

Freeholds were conveyed by lease and release, to trustees to the use of a *feme covert* for her separate use for life, or to the use of such person as she should by writing sealed, &c., appoint, and in default of appointment in trust to pay the rents to her for her separate use. The husband and wife by writing not under seal, for valuable consideration, undertook to execute a mortgage of the property when required. The husband died and no mortgage had been executed: Held, that the agreement was binding upon the surviving wife.

On the marriage of Joseph Waterworth with Julia Booth, in November, 1831, a freehold estate was conveyed by lease and release to two trustees and

(a) *Extract from Decree*:—Decree, that the plaintiff and Bridges do proceed to an action on the following issue, namely, "What is the amount of the loss and damage sustained by the plaintiff in his trade or business of mason and stone deliver, or otherwise, by reason or in consequence of the non-performance and breach by the said defendant of the agreement entered into by him the plaintiff," [stating it,] and the defendant was ordered to admit the agreement, that the plaintiff was lawfully possessed and in the occupation of the ground, and was wrongfully turned out of possession by the defendant.

[2] *Vide Clarke v. White*, 12 Peters, 178. *Rathbone v. Warren*, 10 Johns. Rep. 595, 596. *Hewley v. Cramer*, 4 Cow. 728.

1839.—Stead v. Nelson.

their heirs, "To the use of the said Julia Booth for and during the term of her natural life to and for her own sole and separate use and benefit, or to the use of such person or persons as the said Julia Booth, *by writing under her hand and seal*, should at any time during her intended coverture direct or appoint; and in default of such direction or appointment, then in trust to pay the rents, issues and profits of the said hereditaments and premises into the proper hands of the said Julia Booth, or otherwise to permit her to receive the same for and during her natural life, to and for her sole and separate use, wholly and independently of the said Joseph Waterworth, and without the same being subject to his debts or engagements; and the receipts of the said Julia Booth alone, notwithstanding her coverture, were thereby declared to be good and sufficient discharges for so much of the said rents and profits as should therein be acknowledged or expressed to be received; and from and after the decease of the said Julia Booth, to the use of the said Joseph Waterworth for life," with remainder to the use of the children of the marriage, with remainder to the use of such persons as Julia Booth should by instrument sealed and delivered in the presence of two or more credible witnesses appoint, and in default thereof to the use of her brothers and sisters.

In March, 1833, Joseph Waterworth and Julia his wife borrowed 250*l.* from a Mr. Marshall, and *thereupon Mr. and Mrs. Stead, by in- [*246] dentures of lease and release and appointment, appointed and released the property in question to Marshall in fee, by way of mortgage, to secure the 250*l.*

In September, 1835, Joseph Waterworth and Julia his wife borrowed 120*l.* from the plaintiff, for which they gave their joint and several promissory note, and they thereupon signed and delivered to the plaintiff a memorandum, not under seal, whereby they agreed when requested to "appoint, grant, release and convey in mortgage" the property comprised in the settlement unto the plaintiff, his heirs and assigns forever, and that they would enter into all the usual and reasonable mortgage covenants; they also undertook to iusure the life of Mrs. Waterworth for the purpose of better securing the 120*l.*

Mr. Waterworth died in 1836, leaving two children, and his assets were found insufficient to pay his debts. Marshall's debt was, however, paid by means of a policy which had been effected, and the remainder out of Mr. Waterworth's assets.

The plaintiff's debt remaining unpaid, he filed this bill against Mrs. Julia Waterworth, who had married Mr. Nelson, and against her husband, and a second incumbrancer, praying a declaration that he was in equity entitled to a valid mortgage of the property, and that, subject to the interest of the children and by virtue of the memorandum, he was entitled to an equitable lien upon the said property, and for an account and consequential relief.

There was another question, whether the plaintiff's security was entitled to priority over one subsequent *in date of a Mr. Tolson, [*247] who had taken his mortgage with notice of the plaintiff's charge, but who had got in an outstanding term.

1839.—*Stead v. Nelson.*

Mr. Pemberton and Mr. K. Parker, for the plaintiff, contended that the agreement was binding on the wife, for that the property being settled to her separate use she was to all intents and purposes to be considered with respect to it as a *feme sole*; in that view the agreement was binding on her, and on her separate property, over which she had not been deprived of the power of anticipation; that even if the instrument were defective in form, this court would aid it in favor of a purchaser for valuable consideration.

That this case was like *Witts v. Dawkins*,^(a) where property had been settled during the joint lives of the husband and wife, upon trust for such persons as the wife should appoint, and in default to the separate use of the wife, and an agreement for sale entered into by the husband and wife was established against the purchaser.

Mr. Kindersley and Mr. Metcalfe, contra:—The estate was conveyed to trustees to the use of Mrs. Waterworth for life for her separate use, a legal estate for life became therefore vested in her, which could only be parted with by the due execution of the appointment *under seal*, or by the usual legal modes of conveyance of a *feme covert's* estate. Neither of these have been done, and the instrument, not being under seal, is invalid as an execution under the power.

Again, if the interest for her separate use be of an equitable nature, [248] that equitable estate lasted only during "the life of her husband, so that in this view of the case she had an equitable interest during the joint lives of herself and husband, with a legal remainder during her own life; and this reversionary interest could not, according to the case of *Stiffe v. Everitt*,^(b) be conveyed during the coverture.

The contract of a married woman is void, and so far as the agreement rested in contract it is wholly invalid against Mrs. Nelson.

The case of *Witts v. Dawkins* does not apply. There the husband and wife offered to make a good title by fine or otherwise, which it is plain they might do by the execution of the power of appointment, which was vested in the wife.

THE MASTER OF THE ROLLS:—This estate was vested in Mrs. Waterworth for her life for her separate use. Now supposing a legal estate to have been vested in her, a court of law would take no notice of the words "for her separate use," but in this court those words would give her during coverture the same right over the estate as she would have had if she had been a *feme sole*. [1] Having that right, she enters into a contract, whereby, in con-

^(a) 12 Ves 501.^(b) 1 Myl. & Cr. 37.

[1] Vide *Tullett v. Armatrong*, 1 Beav. 1. *S. C.* 1 Keen, 430, 435, n. 1. 4 Myl. & Cr. 377. *Johnson v. Johnson*, 1 Keen, 648. *Newlands v. Paynter*, 4 Myl. & Cr. 408. *Scott v. Davis*, id. 89. *Simons v. Horwood*, 1 Keen, 7. *Acton v. White*, 1 Sim. & Stu. 429, 432, n. 1. *Vixoneau v. Pegram*, 2 Leigh's (Virg.) Rep. 183. A *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate. *Jacques v. Methodist Ep. Church*, 17 Johns. Rep. 548. *S. C.* 1

1840.—Martin *v.* Swannell.

sideration of a sum of 120*l.*, she agrees to execute a mortgage of this estate. That which was vested in her and over which her power extended was her life estate. It is true that her life might be prolonged beyond the life of her husband, if so, the consequence would be, that she would then have, both in equity as well as at law, an absolute power of disposition over that life estate, and I cannot say that I think that the analogy of a reversionary interest in a **chose en action* in any way applies to this case. It appears to me that she had a power to enter into this agreement, which must be specifically performed with costs, and it must be declared that the plaintiff's mortgage is entitled to priority over that of Mr. Tolson.[2]

MARTIN *v.* SWANNELL.

1840 : March 11, 12, 19.

A testator gave his real and personal estate to his wife for life, and after her decease "unto and amongst his three children, P., E. and T., and their lawful issue, in such proportions, manner and form, and subject to such charges, &c., as his wife should appoint:" Held that in default of appointment, the children took estates tail, and that an appointment to a deceased child and the heirs of her body was invalid.

THE testator having given his real and personal estate to his wife for life proceeded to make a distinct gift as follows :—"And from and after the decease of my said wife, I give, devise and bequeath all my aforesaid real and personal estate, *unto and among my three children, Phæbe, Elizabeth and Tryce, and their lawful issue, in such proportions, manner and form, and subject to such restrictions, charges and declarations, as she my said wife by &c., &c., shall appoint.*" There was no gift over in default of appointment.

The testator died in 1831, leaving his wife and three children surviving.

In 1833 the testator's daughter Phæbe died, leaving a son and two daughters; and subsequently in 1835, the widow, by deed reciting the death of Phæbe leaving children, appointed the real and personal estate (except one acre and 100*l.*) "*to her daughters Phæbe and Elizabeth, and to her son Tryce, and the heirs of their respective bodies*, in equal shares, as tenants in common;" and she appointed the one acre and the 100*l.* to all the persons

Johns. Ch. Rep. 450. 2 Johns. Ch. Rep. 543. 3 Johns. Ch. Rep. 77. And though a particular mode of disposition be specifically pointed out in the instrument or deed of settlement, it will not preclude her adopting another mode of disposition; unless there are negative words restraining her power of disposition, except in the very mode so pointed out. *Ib* Therefore if the wife enters into any agreement, clearly indicating her intention to affect by it her separate property, a court of equity, if there be no fraud, or unfair advantage taken of her, will apply her separate property to satisfy such engagement. *Ib*.

[2] Vide *Knowles v. McCamley*, 10 Paige, 342, 346.

1840.—Martin v. Swannell.

objects of her power as joint tenants, and to their heirs, executors, [*250] administrators and assigns, and if need be to the heirs of their bodies for the largest estate which she had the power to appoint; and the shares of Phœbe she declared was to be subject and charged with the payment to her daughter Elizabeth of 600*l.* and she appointed the same to Elizabeth accordingly.

The widow died in 1835, and a bill having been filed to ascertain the rights of the parties, the cause now came on for hearing.

Mr. *Kindersley* and Mr. *B. S. Follett*, for Tryce Martin the heir-at-law of the testator, contended that the appointment of a share to Phœbe and the heirs of her body was invalid, Phœbe being dead at the time; and there being no gift over, that this share in the real estates was therefore undisposed of, and belonged to the heir-at-law of the testator. *Boyle v. The Bishop of Peterborough*,(a) *Butcher v. Butcher*.(b)

Mr. *Pemberton* and Mr. *Webster*, for the testator's daughter Elizabeth and her husband, admitted the invalidity of the appointment to Phœbe, and contended that there was a gift to the children of the testator in tail, subject to a power of appointment vested in the widow. They cited *Brown v. Higgs*,(c) *The Duke of Marlborough v. Godolphin*,(d) *Harding v. Glyn*,(e) *Casterton v. Sutherland*,(g) *Lyon v. Mitchell*,(h) *Jesson v. Wright*.(i)

Mr. *Koe*, for the son and heir of Phœbe, contended, that she took [*251] an estate tail, either under or in default of appointment, and that this share had therefore descended to her heir.

Mr. *Tinney*, for the younger children of Phœbe, admitted the appointment to her to be void, but contended, that under the word *issue*, the children took by purchase distributively. *Hockley v. Mawbey*.(k)

Mr. *Kindersley* in reply.

THE MASTER OF THE ROLLS :—I must consider the appointment to Phœbe and the heirs of her body as invalid, but that the 600*l.* were well appointed. The only remaining question is, whether an appointment to the children of Phœbe would have been a good appointment, if so all the rest will follow.

March 19.—THE MASTER OF THE ROLLS :—In this case the widow of the testator, Robert Martin, has not duly exercised her power of appointment, as to an undivided part of the estate devised by his will, and the question is, to whom the unappointed share belongs. [His Lordship stated the devise.]

There is no gift in default of appointment, so that the right to the unappointed share depends entirely on the effect of the words just stated.

A devise unto and amongst the three children and their lawful issue would entitle the three children to the real estate as tenants in common in tail. To

(a) 1 Ves. jun. 299.

(b) 9 Ves. 382.

(c) 8 Ves. 561. 5 Ves. 506.

(d) 2 Ves. 61.

(e) 8 Ves. 570.

(g) 9 Ves. 445. Sug. Pow. 6th edit 176.

(h) 1 Mad. 467.

(i) 5 Maule & S. 95. 2 Bl. 1.

(k) 1 Ves. jun. 142.

1839.—Warburton v. The London and Blackwall Railway Company.

the words which give the estate are immediately subjoined words creating the power by which the wife is enabled *to nominate and [*252] determine the proportions, manner and form, in which the shares are to be taken, and the restrictions, charges and declarations, to which they are to be subjected; and it is argued, that the words creating this power clearly show an intention that the issue of the children were to take distributively in concurrence with their parents; that all persons comprised within the meaning of the word "issue," must be deemed to be distinct objects of the power; and that as the word "issue" denotes the object of the power, it must also be taken to denote distinct objects of the devise, and cannot be construed as a word of limitation.

The case of *Hockley v. Mawbey*,(a) was cited as an authority for this argument; but in that case the devise was to the testator's son Richard, and his issue lawfully begotten, to be divided among them as he should think fit. The issue were objects of the power to be exercised by the father; and it is plain, that as amongst themselves, they were to take distributively. In the present case it does not appear that the testator has employed words from which it is necessary to be inferred, that the children and all their issue who might come into *esse* in time, were to take concurrently and distributively.

Supposing the estates given to be estates tail in the children, the issue would take by way of limitation; and the parents, having estates tail, might do the things to which the power extended; and the power not being exercised by the widow, I think that the words giving the estate must be construed in the ordinary way, and that the effect of them is to give the estates tail in the real estate to the children of the testator.

*WARBURTON v. THE LONDON AND BLACKWALL RAILWAY COM- [*253]
PANY.

1839: December 5, 6.

The plaintiff obtained a special injunction, and the defendants subsequently filed a general demurrer, after which, and before the demurrer had been set down, the plaintiff obtained an order of course to amend, "without prejudice to the injunction:" Held regular.

After a demurrer, the plaintiff may, before it has been argued, obtain an order of course to amend; the only question is, what costs he is to pay, and that depends upon whether the demurrer has been set down or not.

On the 16th of November this bill was filed, and on the 18th the plaintiffs obtained *ex parte* a special injunction restraining the defendants from proceeding in their excavations near the plaintiff's houses.

On the 25th of November the defendants moved before the Vice-Chancellor to dissolve the injunction, which motion was standing for judgment.

(a) 1 Ves. jun. 142.

1839.—*Warburton v. The London and Blackwall Railway Company.*

On the 26th of November the defendants filed a general demurrer to the whole bill, and on the following day, (the 27th of November,) and before the demurrer could be set down, the plaintiff, upon petition, obtained as of course at the Rolls an order "to amend their bill as they should be advised, *without prejudice to the injunction* issued in this cause, upon payment of 20s. costs," and undertaking to amend within three weeks.

It was now moved on behalf of the defendants that this order to amend should be varied by omitting the words "*without prejudice to the injunction* issued in this cause."

Mr. *Pemberton* and Mr. *Bigg*, in support of the motion, contended, that by obtaining an order to amend after the demurrer had been filed, the plaintiff had submitted to the demurrer and admitted that there was no equity to sustain the bill, and that consequently there could be no equity to support the injunction; that if the demurrer had been allowed on argument, the cause *would have been out of court, and the injunction would have gone, unless the court upon an examination of the merits thought fit to order otherwise; that consequently an order of this description was not an order of course, but ought, if at all, to have been obtained on a special application showing the merits; that the plaintiff by his amendments might possibly strike out the very facts on which his right to the injunction was founded.

Mr. *Kindersley* and Mr. *G. Russell*, contra:—When an injunction has been granted on the merits a motion to amend without prejudice to it is a motion of course: that was decided in *Pratt v. Archer*.^{a)} 'The case of a common injunction is different; so far, then, the order is regular, and it cannot be affected by the demurrer which has never been set down for argument.

The court will never suppose that the plaintiff will, in amending the bill, strike out the very merits which sustain his injunction.

The defendants are irregular in asking to vary the order: the proper application would have been to discharge it altogether.

Mr. *Pemberton*, in reply:—The defendants could not discharge the order altogether, for so far as it seeks liberty to amend, it is regular.

THE MASTER OF THE ROLLS:—An order to amend will not prejudice either the special or common injunction,^(a) and it would be so whether [255] the words "*without prejudice*" were inserted *or not; the usual course, however, is to insert these words.

In this case a general demurrer has been interposed between the order for the injunction and the order to amend; and the question is, whether that makes any difference. It is said that the order to amend after demurrer admits that there are no merits; that may be so for some purposes, but is not so in a practical sense.

I have nothing to do with the amendments which the plaintiff may make;

(a) 1 S. & S. 433; and see 2 Sim. 488, and the Second General Order of 9th May, 1839, 1 Beavan, x.

 1840.—*Button v. Button.*

the only question is, whether the order has been regularly obtained. I think this case has occurred before, and will therefore inquire.

December 6.—THE MASTER OF THE ROLLS:—I do not think that the order is irregular. Whether expressed to be without prejudice or not, an order to amend does not affect the injunction. When a demurrer is filed, the plaintiff is nevertheless at liberty, before it has been argued, to obtain an order of course to amend his bill, and the amendment will not prejudice the injunction; the only question is, the amount of costs to be paid by the plaintiff, and that depends on whether the demurrer has been set down or not. This motion is irregular, and must be refused with costs.[1]

**BUTTON v. BUTTON.*

[256]

1840: January 11.

A testator gave one estate to James, upon trust to pay to testator's wife 18*l.* a year for life, and after her decease he gave the estate to Thomas. The testator also gave a second estate to James, upon trust to pay testator's wife 28*l.* a year for life, and after her decease he gave this estate absolutely to James; and he declared, that if James should neglect or refuse to pay the annuities from either of the said estates when they became due, that his wife should have power of selling the estates, and to appropriate the money to her own use. The rents being insufficient to pay the annuities: Held, that the widow had a right to sell unless James paid the full amount of the annuities, but that he was not personally bound to pay them.

By his will, dated in 1838, the testator, after giving a leasehold and his household goods, moneys, &c., to his wife, "subject to the payment" of certain legacies, gave as follows:—"I give unto my brother James Button my three cottages or tenements, situate at Castor in the county of Lincoln, upon trust to pay to my said dear wife Elizabeth Button, or her assigns; the sum of 18*l.* per year during the term of her natural life; and after her decease, I give and bequeath the same cottages or tenements, with the yard, outhouses and appurtenances thereto belonging unto my brother Thomas Button, his heirs or assigns for ever, on condition of his paying unto my nephew J. B. the sum of 50*l.* I also give unto my said brother James Button, my share or part of the land left by my father between me and my brother Thomas Button, situate at Castor aforesaid, upon trust to pay to my said dear wife or her assigns the sum of 28*l.* per year during the term of her natural life; and after her decease, I give and bequeath my share or part of the said land with the buildings thereon unto my said brother James Button, his heirs or assigns for ever. I direct that the said two sums of money, amounting to 46*l.* per year, be paid to my said wife Elizabeth Button or her assigns quarterly, on the 1st

[1] Vide *Ferrand v. Hamer*, 4 Myl. & Cr. 145, 146. *Wellesley v. Wellesley*, id. 554, 558. *Renwick v. Wilson*, 6 Johns. Ch. Rep. 81. 1 Hoff. Ch. Pract. 301. 1 Barb. Ch. Pract. 113, 210. 2 Sim. 489, n. 2.

1840.—Button v. Button.

of January, the 1st of April, the 1st of July and the 1st of October, in every year, and each quarterly payment to be made within one month after [*257] becoming due; and I hereby declare that if *my said brother James Button shall neglect or refuse to pay the quarterly sums of money above mentioned from either of the said estates when they become due, my will is that my said wife shall have full power to sell either or both of the said estates by auction, or in such manner as she may think fit after the expiration of two months from the time of my said brother James Button's neglect or refusal to make the said quarterly payments, and appropriate the money arising from such sale to and for her own use and benefit;" and he gave the residue of his real and personal estate to his wife.

James Button was in possession of the second-mentioned premises at the decease of the testator, and continued in such possession; but the rent thereof was wholly inadequate to pay the annuity of 28*l.* and the same remained unpaid. James Button was however willing to pay to the widow the whole amount of the rents. The widow, by this bill, insisted that she was entitled to have an immediate sale of the premises for payment of the arrears and accruing payments; and secondly, that the defendant, James Button, having accepted the devise, took the estate subject to the condition of paying the full amount of the annuities for which he had become personally liable.

Mr. *Pemberton* and Mr. *Thomas Turner*, for the plaintiff.

Mr. *Bethell*, contra, cited *Doe v. Wrighte*.(a)

THE MASTER OF THE ROLLS:—In considering this case, I must take the several clauses in this will together, in order to collect from them, [*258] *if possible, the intention of the testator.[1] I am of opinion that the intention of the testator apparent on this will was this, that his wife should have a provision secured to her to the extent of these two annual sums. He may not have provided for it in a mode strictly in accordance with technical rules, but he has directed that one estate should pay 19*l.* and the other estate should pay the sum of 28*l.* a year, without directing the payments to be made out of the rents and profits. The case of the first annuity is certainly exposed to the difficulty which has been pointed out by the defendant's counsel, that there is a gift over to another person after the death of the wife.

The testator, however, directs the specific payments of these particular sums on the several quarter days, and then he says, that if John Button should neglect or refuse, to pay the quarterly sums above mentioned from either of the said estates when they became due, his will was, that his wife should have full power to sell either or both of the said estates by action, or in such manner as she might think fit after the expiration of two months

(a) 2 B. & Ald. 710.

[1] Vide 3 Myl. & Cr. 614, n. 2. 1 Sim. 271 n. 1. *Pond v. Bergh*, 10 Paige, 141. *Jennings v. Newman*, 10 Sim. 223. *Benn v. Dixon*, id. 638. *Vaughan v. The Marquis of Headfort*, id. 641.

1840.—*Miller v. Little.*

from the time of his said brother's neglect or refusal to make the payments and appropriate the money arising from such sale for her own use and benefit. This gentleman has not made the payments, and the reason which he gives for not making them is not, as I conceive, an answer to the plaintiff's claim. He says the rents have not produced enough to pay these annual sums to the testator's widow: the consequence then is, that the wife has a power to sell the estate, and I apprehend she must now be declared to have the benefit of that power. If the defendant John Button is desirous of preventing the execution of that power, he has the means of doing so, by making the payments; if he objects to do that, and I think he is under no personal *obligation to do it, then the power attaches, and I think the plaintiff [*259] will be entitled to a decree for a sale. The costs ought to be paid out of the estate.(a)

MILLER v. LITTLE.

1840: January 11.

A testator bequeathed as many of his canal shares as he should leave children him surviving, one of such shares to be in trust for each of his children. At the date of his will he had eight shares and seven children, and at his death he had ten shares and eleven children: Held, that the bequest was specific.

THE testator by his will, dated in March, 1812, gave and bequeathed to his executors and trustees in these words: "As many of *my* shares in the Grand Junction Canal Navigation as I shall leave children me surviving, or born in due time after my death;" he then declared the trusts of this gift to be to stand possessed "of one of such shares in the said Grand Junction Canal Navigation" for each of his "children whom he should leave him surviving, or as should be born in due time after his death," and their children, in manner therein mentioned.

The testator had eight canal shares at the time of his will, and ten at the time of his death.

The testator had seven children at the time of making his will, and eleven at his death, and one of the questions was, whether the bequest of these shares was a general or a specific bequest.

Mr. *Pemberton*, and Mr. *Evans*, for the plaintiffs, argued that the legacies were specific.

*Mr. *F. J. Hall*, contra, contended that the legacies were general, [*260] and that the intention of the testator was, that the number of shares should be made equal to the number of the children left by him out of his personal estate.

(a) See *Talbot v. The Earl of Radnor*, 3 Myl. & K. 252. [*Hodge v. Lewin*, 1 Beav. 43.]

1840.—*Miller v. Little.*

Mr. Stuart, Mr. Wilbraham, Mr. Roupell and Mr. K. Parker, for other parties.

THE MASTER OF THE ROLLS, said he thought the bequest in question was a specific bequest of the eight shares which the testator had at the date of his will; for the testator had given as many of *his* shares in the Grand Junction Canal Navigation as he should leave children, and afterwards spoke of such shares, which could refer only to those described as "*my* shares," or those which he then had; he therefore considered this was a specific and not a general legacy, and that the eight shares only were subject to this bequest.(a)[1]

(a) See *Kirby v. Potter*, 4 Ves. 750.

[1] A testator bequeathed what he called "all *my* shares in the Nottingham Canal Navigation." The only subject to which the bequest could apply, was shares in the Nottingham Canal Company, to which the testator's wife was entitled in her own right. The main point in the case was, whether this was a case of election; but as incidental to that question it became necessary to consider whether the legacy was, or was not specific; and it is in reference to the latter topic, only, that the case is cited. Lord Cottenham says; "the point for consideration, therefore, is, did the testator, by the words in his will, '*my* shares in the Nottingham Canal Navigation,' refer to and intend to dispose of the shares described in the Master's report. This point was very properly put by Mr. T., in arguing for the widow, principally upon the question whether the terms used gave a specific legacy or not. To try this, we must suppose the shares to have been his own. Would not the legacy in that case have been specific? It is a bequest of '*my* shares,' and in a particular company. It must be either specific, that is of what he had, or assumed to have at the time, or general, that is, a direction to his representative to purchase or procure what is given: but the direction to sell has been held inconsistent with the latter construction. It was argued that the bequest might be construed to mean such shares as he might have at the time of his death, either by a transfer to himself of the shares in question, or by the purchase of others; but the word '*my*' being expressive of a present title, excludes this argument: besides which, the testator has used other words to include any canal shares afterwards acquired. I must, therefore, assume, that the words describe some existing shares in the Nottingham Navigation, which takes this case out of the authority of the case of *Dummer v. Pitcher*, 2 Myl. & K. 262,) in which Lord Brougham decided, first, that the gift was not specific, and secondly, that it was not a case of election; and I do not feel called upon to enter into any consideration of the question discussed in that case, how far evidence *dehors* the will is admissible, in explanation of the testator's meaning, for the purpose of raising a case of election; because in every specific devise or bequest, it is clearly competent and necessary to inquire as to the thing specifically devised or bequeathed; and the word '*my*' constitutes part of the description." "It appears then, that the shares in the Nottingham Navigation stood in the name of the testator, jointly with the name of his wife: that by virtue of these shares, he was elected and acted as a member of the committee of the company, and received the dividends; and that having no other shares, he bequeathed '*all my* shares in the Nottingham Canal Navigation.' This appears to me, consistently with all the authorities, to be a bequest of the shares in question." *Shuttleworth v. Graves*, 4 Myl. & Cr. 35, 37. See further *Douglas v. Congreve*, 1 Keen, 410. *Campf v. Jones*, 2 Keen, 756. *Davies v. Morgan*, 1 Beav. 406. *Jones v. Bruce*, 11 Sim. 228. *Hoeking v. Nicholls*, 1 Yo. & Col. C. C. 478.

1840.—Toghill v. Grant.

HUTTON v. MANSELL.

1840: January 11.

A purchaser under the court will not be allowed to take possession "without prejudice to objections to the title," even upon payment of his purchase money into court.

MR. GORDON moved on behalf of a purchaser under the court to pay in his purchase money, and to be permitted to take possession of the property *without prejudice to objections to the title.*

Mr. Allfrey for some parties to the cause.

THE MASTER OF THE ROLLS considered it irregular to *allow a [*261] purchaser to take possession, unless he accepted the title.(a)[1]

TOGHILL v. GRANT. IN RE BOORD

1839: December 24. 1840: January 13.

This court has authority to refer for taxation the bill of costs of a solicitor who acts as agent for another.

THE petitioner, Mr. Boord, an attorney and solicitor, had employed Messrs. Morris and Verbeke partly as his agents and partly as his solicitors; and the latter having brought an action at law to recover the balance of his account current, Mr. Boord presented a petition, praying that the respondents might be restrained from proceeding at law, the petitioner being willing to deposit the amount for which the action had been brought, and that the bills might be referred for taxation, as to a specified part as between solicitor and agent, and as to the remainder as between solicitor and client. The controversy on the affidavits filed in the matter seemed principally to relate to whether particular parts of the business had been transacted on agency or otherwise.

Mr. Pemberton and Mr. Ellis, in support of the petition, cited *Lees v. Nuttall*(b) and *Jones v. Roberts*,(c) in which the Vice-Chancellor, after argument, expressly decided that this court has jurisdiction to order an agent's bill to be taxed on the application of the solicitor who employed him.

*Mr. Dixon, contra:—The question is, whether the bill of an agent [*262] is taxable at the instance of a solicitor. The statute of 2 G. 2, c. 23, s. 23, applies only to the ordinary case of a solicitor and an unprofessional person, and the 12 G. 2, c. 13, s. 6, expressly exempts the taxation of bills due "from any attorney or solicitor to any other attorney or solicitor." That

(a) The order was afterwards made, without the qualification as to the title

(b) 2 Myl. & K. 284.

(c) 8 Sim. 397.

[1] As to the proceedings for putting a purchaser into possession, see *Kershaw v. Thompson*, 4 Johns. Ch. Rep. 609. *Ludlow v. Lansing*, Hopk. 231. *Darcy v. Campbell*, 1 Blund's (Maryland) Rep. 364.

 1840.—The Earl of Chesterfield v. Bond.

such a bill was not taxable was decided by the full Court of Common Pleas in *Weymouth v. Knipe*.^(a)

As there are proceedings pending at law the petitioner ought to have obtained a reference in that court under a judge's order, and not come here and transfer the jurisdiction.

Mr. *Pemberton*, in reply:—*Weymouth v. Knipe* was decided before *Jones v. Roberts*, and was cited to the Vice-Chancellor, who nevertheless made the reference. The court orders a taxation, not under the statute but under its general jurisdiction in cases of its officers; and such a jurisdiction has been exercised by the court from the time of Lord Hardwicke.

THE MASTER OF THE ROLLS said he must examine the cases before he decided; that there ought to be an uniformity in the practice, and if he found the case before the Vice-Chancellor similar to the present, he must order the taxation of the agency bill in this case.

1840: January 13.—THE MASTER OF THE ROLLS said he had looked at the report of *Jones v. Roberts*, which appeared to be in conformity [263] with several prior cases; he must, therefore, act on it and make the order for taxation in the present case.^(b)

THE EARL OF CHESTERFIELD v. BOND.

1840: February 8.

It is not necessary that the common injunction for want of appearance should be obtained in term or during the seal, it may be regularly obtained any day on which the court is sitting.

Service of a *subpœna* by leaving a copy at the defendant's residence sealed up in a letter, at the same time producing the original, held regular.

ON the 27th of January, 1840, the defendant was served with a *subpœna* to appear, by leaving a copy at his residence and at the same time producing the original. The copy, however, was delivered to the defendant's servant in a sealed letter. The defendant received the letter when he got up on the following morning, (the 28th,) and he sent it to his solicitor with instructions to do what was necessary.

An attachment for want of appearance was sealed early on the 1st of February, but afterwards, on the same day, the defendant's solicitor entered an appearance, and the common injunction was obtained on the same day by the plaintiff. The 1st of February was the first day after term, and was neither a seal day nor the continuance of the seal.

(a) 3 Bing. N. C. 387, and 5 Dowl. P. C. 495.

(b) A petition of appeal was presented by the respondents, which the Lord Chancellor on the 22d April, 1840, dismissed with costs, but without deciding the principal point. [As to the taxation of agent's bills, see further, *In re Smith*, 4 Beav. 309.]

1840.—The Earl of Chesterfield v. Bond.

It was now moved, on the part of the defendant, that the attachment for non-appearance and the order for the injunction might be discharged for irregularity.

The irregularity complained of was, that the service, by leaving a copy of the *subpœna enclosed in a letter*, was irregular; and that the order for an injunction, which was neither made in the term nor during the seal, was also irregular.

Mr. Kindersley and Mr. Toller, for the motion, contended that [*264] the service of the *subpœna* was irregular, the copy being sealed up, and thereby giving no opportunity to the servant of knowing that the contents were of a pressing nature or of comparing the copy with the original; that such was not the service contemplated by the 4th General Order, 1833,(a) the object of which was to give open and distinct notice of what was required from the defendant. That the injunction was also irregular, it being founded on an attachment issued upon this service, and it having been obtained out of term and not on a seal day; that *Rowe v. Jarrold*,(b) had settled the very point; so in *Saxby v. Saxby*,(c) the Vice-Chancellor held that a motion to commit could only be made on a seal day. That *Brierley v. Warmesley*,(d) was decided on the 10th General Order, 1833, which did not apply to injunctions *for want of appearance*.

That the defendant's appearance did not cure the defect in the service of the *subpœna*; 1 Daniells, Pr. 667, and *Robinson v. Nash*,(e) where an attachment was issued against a defendant for non-appearance to a *subpœna* which had been issued against him, and in which he was described in a wrong name, it was held that his appearance for the purpose of discharging the attachment would not relate back so as to cure the defect in the *subpœna* and bring him into contempt for not appearing; 1 Smith, Pr. 602., and *Lee v. Ravenscroft*,(g) were cited.

Mr. Pemberton and Mr. L. Wigram, contra, contended that the service had been strictly according to the *General Order, and was [*265] regular; that if not, then that the irregularity had been cured by the defendant's appearance, as he had not appeared conditionally with the register to enable him to argue the point; *Davidson v. The Marchioness of Hastings*;(h) but had appeared generally without reserving that right.

That the injunction had issued in conformity with the present practice, *Brierley v. Walmsley*;(i) and such orders being made without notice, there was no sound reason for confining applications for them to seal days.

Mr. Kindersley:—To hold that this is a good service would be to expose defendants to fraud and inconvenience; service of a *subpœna* in a hamper might equally well be held good service.

(a) 1 My. & K. iv.

(d) 1 Keen, 141.

(h) 2 Keen, 509.

(b) 5 Mad. 45.

(e) 1 Anst. 76.

(i) 1 Keen, 141.

(c) 7 Simons, 140.

(g) 6 Sim. 474.

 1840.—The Earl of Chesterfield v. Bond.

THE MASTER OF THE ROLLS:—This is an application to discharge an attachment and to set aside an order for an injunction for irregularity.

The attachment issued for the non-appearance of the defendant in obedience to the *subpœna* to appear and answer, and it is now alleged that the *subpœna* was not duly served. It is admitted that the letter of the order which directs the mode of service of *subpœnas* has been complied with. One can conceive a case in which service has been effected fraudulently, and though strictly according to the letter of the order, yet accompanied with circumstances intended entirely to mislead the party served; one can also conceive a case in which, without any intention whatever of fraud, there has been service pursuant to the strict letter of the order, but attended [*266] with circumstances which have "mislead the defendant and have occasioned his non-performance of the duty required of him. When such cases occur, there will be no difficulty in providing a remedy. In this case there has been no fraud—no attendant circumstances in any way calculated to cause the least deception—there has been no mistake and nothing has occurred calculated to mislead the defendant,—so far from it, the defendant seems to have understood what he had been served with, and the duty which he had to perform, and immediately gave directions for its performance, and it has been accordingly performed; here, then, we have the letter of the order strictly complied with, the party served understanding what was required of him, and the duty enjoined strictly and duly performed.[1] I cannot think that under these circumstances there is any irregularity to complain of; and if there had been any irregularity, I think it has been entirely waived by the appearance; the duty has been performed, the party has appeared and has submitted to the jurisdiction of the court.[2] If he had any reason to complain of the mode of service, he had another remedy,—by entering a conditional appearance without prejudice. I am, therefore, of opinion that the attachment cannot be discharged.

The next question is, if the order for the injunction is to be discharged. The old practice was, that a motion for an injunction could only be made in term or during the seal; but on a consideration of the new orders it appeared to the Vice-Chancellor that with respect to injunctions for want of answer

[1] As to the validity of the service of a *subpœna* without actual delivery to the defendant; see further, *Dodd v. Webber*, post, 502; *Kinder v. Forbes*, post, 503; 2 Keen, 513, n. 1.

[2] So, in *Parker v. Williams*, 4 Paige, 439, Wallworth, Ch. said; "There was a technical irregularity in this case, in serving the defendant with the injunction without taking out and serving him at the same time, with a subpoena to appear and answer: and if the application had been made the first opportunity, the injunction might have been dissolved on that ground: but this irregularity was waived by the defendant voluntarily appearing and putting in his answer. It was therefore too late for him to make the objection after such a lapse of time, and after those proceedings had taken place. Where a party seeks to set aside the proceedings of his adversary, upon a mere technical irregularity, he must make his application the first opportunity he has for that purpose." See further *Hart v. Small*, 4 Paige, 288. 1 Barb. Ch. Pract. 78. 1 Hoff. Ch. Pract. 105, n. 5. The same analogy is pursued in proceedings at law. *Nichols v. Nichols*, 10 Wend. 571. 1 Dunt. Pract. 331, et seq. Vide etiam, 1 Beav. 78, n. 1.

1840.—Duffield v. Elwes.

after appearance, there might with advantage to the suitors be an alteration in the old practice, and that they might properly be granted on any day on which the court was sitting; a new practice, therefore, arose, and he having frequently permitted such orders to be made, I adopted the practice after a communication with him on the *subject. The analogy be- [*267] tween a common injunction for want of answer and a common injunction for want of appearance is so striking and obvious, that if the practice is settled in one case it can hardly be considered not to be settled in the other case. The Registrar tells me that there has been an invariable practice going on for three or four years, in which every party entitled to an injunction for want of appearance, has obtained the order notwithstanding he was not in a condition to ask for it at the commencement of the seal. If, therefore, I were to declare this to be irregular, it would be to declare that all orders upon this point of practice have been irregular. I think it advantageous to the suitors that this practice, which has now been adopted for some years, should be maintained, and that the injunction is regular: this motion must, therefore, be refused, with costs.

CALVERT v. GODFREY.

1840: February 8.

[Certain words in a decree, affecting the rights of an infant heir, it was held, ought to be omitted.]

THE minutes of the decree directed a conveyance to be settled by the Master "*if the parties differed.*"

There was an infant heir who was a party to the cause and a necessary party to the conveyance.

THE MASTER OF THE ROLLS held that the words "*if the parties differed*" ought to be omitted, an infant being interested.

Mr. *James Parker*, for the plaintiff.

DUFFIELD v. ELWES. IN RE CHAMBERS.

[*268]

1840: January 24, February 11.

An order was made on a person not a party to the cause, for payment of a sum of money within three weeks from the date of the order, but it was not served until after the expiration of that time: Held, irregular, and the subsequent proceedings to a commitment were set aside.

Mode of enforcing payment of a sum of money under an order of the court against one not a party to the cause.

It is irregular to serve a writ of execution commanding payment of money after the expiration of the time appointed for payment in the order upon which the writ is founded.

In this case an order had been made on the 2d of May, 1839, that Mr. Chambers (who was not a party to the cause) should pay to Mr. Wilton the

1840.—*Duffield v. Elwes.*

sum of 67*l.* 10*s.* 4*d.*, the amount of certain costs, within three weeks from the date of the order, that is, from the same 2d of May.^(a) This order was not served, and no payment was demanded till the 8th of June, 1839, which was about five weeks from the date of the order. Payment not having been made, a four-day order was obtained on the 12th of June, and an order for the commitment of Mr. Chambers was obtained on the 14th of November, following. It was now moved to discharge the orders of the 12th of June, and 14th of November, on the ground that the service of the order of the 2d of May, after the expiration of the time therein limited for payment of the money, was irregular.

Mr. *Pemberton* and Mr. *Dixon*, for the motion, contended that the proceedings were irregular; that by serving the order after the time limited for payment, a compliance with it had been rendered impossible, and that it would be most unjust to visit a party with the punishment of a contempt for the disobedience of an order, obedience to which had been rendered impossible by the default of the party prosecuting it. They cited an unreported case of *Phillips v. Worth*.

Mr. *James Russell*, contra, contended that the service of the order of the 2d of May, was regular; that the order having been made on notice, Mr. [*269] Chambers *was cognizant of it; and that service was not absolutely requisite.

Mr. *Pemberton*, in reply.

February 11.—THE MASTER OF THE ROLLS:—The only case cited in support of this motion was *Phillips v. Worth*, before Lord Brougham, on the 23d of January, 1831. In that case there was an order upon a party in the cause to deliver goods to a receiver in eight days from the 30th of November, 1830, the date of the order. This order was served on the 8th of December, and on the 11th of December, a writ of execution, misreciting the order and stating it to be for the delivery of the goods in fourteen days, was issued; and the defendant being arrested upon an attachment for disobedience of the writ, moved to discharge the attachment for irregularity. On an appeal from an order of the Vice-Chancellor, and on the 23d January, 1831, the order of the 30th of November, was discharged without costs, and the plaintiff was ordered to pay the costs of all the proceedings after the date of that order. As the writ of execution was irregular in misreciting the order of the 30th of November, the order of the 23d day of January, can scarcely be considered an authority upon the present occasion; but according to the general practice of this court, I consider it to be clearly irregular to serve a writ of execution commanding payment of money, after the expiration of the time appointed for payment in the order upon which the writ is founded.

In the process by which a person, not a party to a cause, is to be compelled

(a) See 2 Keen, 497.

 1840.—Miller v. Woodward.

to pay money or costs to another there can be no writ of execution, the object is effected by service of orders and by commitment. *The [*270] process is unfortunately very tedious; when the first order does not appoint a time for payment there must be a second order for payment in a limited time. Upon disobedience to that order, there follows an order that payment may be made in as short a time as four days or that the person may stand committed; and lastly follows an order for commitment.[1] At one time I had considered that in such cases, the second order limiting the time for payment might be dispensed with, but it appears to have been established that such order is required; and this being so, it is surely necessary that the order limiting the time should be treated as having a definite meaning, and should be so served as to make it possible for the person upon whom it is served to obey it, *i. e.* within the time limited for payment. Although the motion is made upon notice, the person is not, under ordinary circumstances judicially deemed to be cognizant of it till it is served upon him, and he cannot justly be said to be guilty of contempt or disobedience by non-payment within a limited time, if he does not know of the order till after the expiration of the limited time. The time limited in this order cannot be said to be immaterial; if it were so, and the service and demand of payment might be made at any time after its expiration, then the order, notwithstanding the limitation of time which it expresses, would in substance and effect be an order to operate without limitation of time, and consequently not such as the practice requires; it would not in reality be different from the first direction to pay without the appointment of any particular time, and would therefore be an insufficient foundation for the minatory or four-day order.

I have not been able to find any authority upon the subject, but under the circumstances which I have stated, it appears to me that the order of the 2d of May, *was not regularly served, and consequently that the [*271] subsequent orders of the 12th of June, and 14th of November, were irregularly obtained, and I must, therefore, grant this motion.[2]

 MILLER v. WOODWARD.

1840: February 11.

A husband went abroad, leaving his wife and child unprovided for, whereupon the father of the husband and the father of the wife entered into an agreement to allow the wife 30*l.* each, "so long as she should continue separate and apart from" her husband: Held, that the allowance terminated by the death of the husband.

THE case came before the court on general demurrer; and according to

[1] There must also, be a demand of payment by a person authorized to make it; who must be furnished with sufficient authority for the purpose of receiving payment; and the absence of such authority, although not alleged at the time of demand, as an objection, is sufficient to prevent the party from being brought into contempt for non-compliance with the order. *In the Matter of Isaac*, 3 Myl. & Cr. 319.

[2] Vide *Leake v. Nalder*, 1 Rum. & M. 357.

1840—Miller v. Woodward.

the statements of the bill, Charles J. Woodward married in 1825, and in 1828 left England for India, without making any provision for the maintenance and support of his wife Eleanor J. Woodward, and their child, whom he left in England. Being destitute of the necessary means of support, and there being no probability of Charles J. Woodward's return to England, Eleanor J. Woodward, in the month of February, 1828, requested the plaintiff, her father, and James Woodward, the father of Charles J. Woodward, to make some arrangement for the maintenance and support of herself and her child; that thereupon it was agreed between the plaintiff and James Woodward, that they should secure to Eleanor J. Woodward the payment of an annuity of 60*l.*, to be paid by the plaintiff and James Woodward in equal shares. In pursuance of such agreement, and with the view of carrying the same into effect, the following memorandum, bearing date the 18th of March, 1828, was duly signed by the plaintiff and James Woodward: "We the undersigned do hereby mutually agree with each other to pay or allow to Eleanor J. Woodward the sum of 30*l.* each, *so long as she shall continue separate and apart from the said Charles J. Woodward.* And we further agree, when either of us shall require it, to execute any deed which may be necessary [*272] for *securing the above provision. The above sum to be paid half yearly."

Charles J. Woodward died in India, and up to his death his wife continued to live apart from him.

The question raised by the demurrer was, whether the allowance of 60*l.* did, or not, cease upon his death.

Mr. G. Turner, in support of the demurrer, submitted that the annuity terminated upon the decease of Charles J. Woodward. That it was evident from the situation of the parties at the time the agreement was entered into, and from the terms of the agreement itself, that the two parents contemplated only the payment of the annuity during the joint lives of their son and daughter, determinable, nevertheless, if they ceased to live separate.

That this was the proper construction to be placed upon the instrument, was evident; that the word "continue" showed that the parties contemplated the same description of separation as then existed, and not that separation which would take place on the death of either of the parties,—they contemplated a voluntary separation dependent on their mutual will. That if it had been the intention of securing the annuity for her life, it would have been so expressed.

That the construction contended for by the plaintiff would go to this absurd extent, that if the wife married a man having adequate means to support her the annuity would still be payable to the second husband,—a construction which could not possibly be supported.

Mr. Tripp, contra:—*Prima facie* it must be assumed that this annuity was payable during the life of Mrs. Woodward, the daughter. There is [*273] nothing upon the *face of the memorandum of agreement itself, or in

1840.—*Foulkes v. Jones.*

the circumstances of the case, to lead to the conclusion that the parties contemplated that in the event of the death of the husband the payment of the annuity should cease.

The bill, which for the purpose of this argument must be assumed to state the facts correctly, shows that the object of the parties was to maintain not only the daughter but her child; and the death of Woodward the husband would render the necessity of a provision for his wife and child still more imperative; that the parties intended merely, that if the husband and wife lived together, the payment of the annuity should cease; the agreement to carry out the intention of the parties must be construed as giving the annuity to Mrs. Woodward for life, but determinable if she should cease to live separate from her husband. Mrs. Woodward has always, since the date of the agreement, lived separate and apart from her husband; and she is now in terms living separate and apart from him, the annuity is consequently still subsisting.

THE MASTER OF THE ROLLS:—The question here is, whether the annual sums agreed to be paid were payable for the life of Mrs. Woodward, or whether they determined upon the death of her husband. The payment was to be made so long as Mrs. Woodward should continue to live separate and apart from her husband.

I cannot infer from such a stipulation, that the parties intended the payment to be made for the life of Mrs. Woodward. I think that upon the death of Mr. Woodward, the husband, the annuity was no longer payable: this demurrer must therefore be allowed.

Demurrer allowed.(a)

***FOULKES v. JONES.**

[*274]

1840: February 8, 11.

After an attachment for want of answer, it is irregular to file a plea without first tendering the costs of the contempt.

IN this case the defendant, having appeared to the bill, did not put in his answer in due time.

On the 2d of December, an attachment was issued against him. The attachment was not executed, but the defendant, being in contempt, on the 16th of January obtained a commission to take his plea, answer or demurrer; not demurring alone.

On the 27th of January he put in a plea, and on the 28th of January obtained an order to set down his plea for hearing.

The plaintiff now moved to discharge that order, and take the plea off the file for irregularity.

(a) See *Burchett v. Woolward*, Turn. & Russ. 442.

1840.—*Davies v. Hopkins.*

The irregularity alleged was, that the defendant being in contempt had filed his plea without having paid or tendered the costs of the attachment.

Mr. *Pemberton* and Mr. *Craig*, in support of the motion.

Mr. *Hetherington*, contra, cited the cases of *Barber v. Crawshaw*,^(a) and *Sanders v. Murley*.^(b)

February 11.—THE MASTER OF THE ROLLS:—In the two cases cited in opposition to this motion, and in the case of *Hamilton v. Hibbert*,^(c) [*275] it was held, *that a plea might alone be filed after a defendant was in contempt to an attachment: but in those cases there is nothing from which it can be inferred, that such plea could be filed without first paying or tendering the costs of the attachment.

The case of *Mellor v. Hall*,^(d) was upon a demurrer, and therefore is not a decision applicable to the present case; but the *dictum* of the Vice-Chancellor, Sir John Leach, is according to the practice and the former decisions, "that after an attachment, unless it be an attachment with proclamation returned, a defendant, *upon payment or tender of his costs*, may put in a plea or answer without special order;" but previous payment or tender of the costs is required, and having been omitted in this case, the plaintiff is entitled to the order for which he asks, but as he does not object to waive it on terms, I make no order except that the defendant pay the costs of the attachment and of this application.

[*276]

*DAVIES v. HOPKINS.

1840: February 11, 12.

A testator bequeathed a moiety of personal estate to his daughter for life, with remainder to her children, with remainder to the children of such children as should die in the life of the daughter; he gave the other moiety to his son for life, with remainder to his children; but if his son died without issue him surviving, he gave the last mentioned moiety to the children of the daughter, "in such shares and proportions and in such manner as was thereinbefore directed and appointed for the payment and division of their shares in the other moiety;" the son died without issue: Held, that the daughter took a life interest in the second moiety by implication.

Bequest of 600*l.* to be applied towards payment of the debt to which Z Chapel was or might be subject at the testator's decease. The chapel was vested in trustees for a particular class of dissenters. The general body of that class had incurred a debt for building chapels, and 600*l.* were laid on Z Chapel, which it was expected would be raised by voluntary subscription of the members, but there was no legal liability: Held, that the legacy failed.

THE testator, Philip John, by his will dated the 25th of September, 1834, gave and bequeathed all the residue of his personal estate to trustees, in trust to invest and pay the interest of a moiety thereof to his daughter Mary Jenkins for her separate use for life; and after her decease, upon trust to pay and transfer one moiety of the whole principal moneys amongst her children, share and share alike, but in case any of the children of his said daughter

(a) 6 Mad. 234.

(b) 1 Sim. & St. 225.

(c) 2 Sim. & St. 225.

(d) 2 Sim. & St. 321.

1840.—*Davies v. Hopkins.*

should happen to die in her lifetime, leaving issue at the time of his or her decease, then his will was, that the share of such child so dying should be equally divided amongst all their children; and upon trust, that his trustees should pay the dividends, interest or proceeds of the other half part or share of the said principal moneys or residue of the said estate so invested as aforesaid, into the hands of the testator's son, Thomas John, for life, with remainder absolutely to the children of Thomas John; but in case any of the children of the testator's said son Thomas should happen to die in the lifetime of his said son leaving issue living at the time of his or her decease, then his will was, that the part or share, parts or shares of such child or children so dying of and in the said trust moneys should accrue to "and [*277] be equally divided and paid to and amongst all and every his or her child or children, if more than one share and share alike, as his, her or their original share or shares respectively would become due and payable; and upon trust, that if the testator's said son should depart this life leaving no issue him surviving, then the testator willed and directed, that the said residue of all his personal estate so remaining invested as aforesaid should be paid and divided to and amongst all and every the child or children of testator's said daughter Mary, *in such shares and proportions, and in such manner as was thereinbefore directed* and appointed for the payment and division of their said original share or shares *in the other moiety*, half part or share of his said personal estate.

By a codicil dated the 9th of May, 1833, the testator gave and bequeathed to Thomas Dalton, named and appointed by him as one of the executors of his last will and testament, the sum of 600*l.* *to be by him applied in and towards payment and discharge of the debt to which the chapel called the Zion Chapel*, situate in the Hayes, in the town of Cardiff, in the county of Glamorgan, at which the members of the Welsh Methodist Society congregate, *was or might be subjected at the testator's decease.*

The testator's son, Thomas John, died without issue him surviving.

By the decree it was ordered, that the Master should inquire and state, whether the chapel called Zion Chapel in the pleadings mentioned was at the time of the death of Philip John, the testator in the pleadings named, subject to any and what debt, and in whom the property of the said chapel was vested; and in "making such inquiries he was to be at liberty to [*278] state special circumstances.

The Master found that the said chapel called Zion Chapel in the pleadings mentioned was not at the time of the death of the said Philip John subject to any debt; and he found that the chapel was vested in trustees for "Calvinistic Methodists." And he found that Richard Thomas by his affidavit stated, that at a committee meeting of the connection of Calvinistic Methodists, held on or about the 17th day of May, 1832, a division of debt incurred by the said connection in the erection of chapels or places of worship in the said county, was made among several of the societies or congregations belonging

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to the said connection, and the sum of 600*l.* was laid on the society or congregation belonging to Zion Chapel, in the town of Cardiff, as their portion of the said debt; and that the mode by which the said money was expected to be raised was by a voluntary subscription on the part of the members of the society aforesaid, and of other persons piously disposed to contribute to the same object; and the deponent further stated, that the members of the said connection, resorting for the purpose of divine worship to the said chapel, had been and then were held liable to pay to the said connection the said sum of 600*l.* but that no security was ever given or existed for the payment of the said sum of 600*l.*; and the deponent further stated, that Philip John, the testator in the pleadings named, was a member of the congregation of Calvinistic Methodists resorting to Zion Chapel aforesaid, for the purpose of divine worship; and the deponent stated, that he had reason to believe that the said Philip John was well aware at the time of making his will and codicils, and of his death, that the said chapel called Zion Chapel, or [279] the congregation resorting thereto, was or were held liable to pay to the said connection of Calvinistic Methodists in the said county of Glamorgan, the sum of 600*l.*; and the deponent further stated, that the sum of 600*l.* had not hitherto been paid off, but still remained due.

There were two questions, first, as to the gift to the chapel, whether there existed any such debt thereon at the time of the testator's death, as was alluded to in his will; and secondly, whether the testator's daughter Mary was entitled by implication to a life interest in the moiety of the residue given to Thomas John.

Mr. *Pemberton* and Mr. *Puller*, for the plaintiff, on the first point cited *Corbyn v. French*,^(a) *Waterhouse v. Holmes*.^(b)

Mr. *Kindersley* and Mr. *Elderton*, for the trustees of the chapel.

Mr. *Coleridge* contended there was a gift by implication to Mary *Davies* for life on the second moiety.

Mr. *Jeremy*, for the children, contra.

The cases cited on the second point were *Milsom v. Awdry*,^(c) *Bird v. Hunsdon*,^(d) *Townley v. Bolton*,^(e) *Blackwell v. Bull*,^(g) *Radcliffe v. Buckley*,^(h) *Cripps v. Wolcott*.⁽ⁱ⁾

[280] **THE MASTER OF THE ROLLS:**—The first point is as to the gift to the chapel. It appears from the affidavit set out in the Master's report, (the facts in which, with the consent of the parties, I am to treat as if they were special circumstances found by his report,) that there was neither at the date of the will, nor at the date of the codicil, anything which could clearly and regularly be called a debt charged upon this chapel, or due from the persons who were members of it; but about two years previous to the date of the will, by some arrangement amongst the Methodists' connection, a

(a) 4 Ves. 418, 427; 2 Rep. Legacies, 124.

(c) 5 Ves. 465.

(g) 1 Keen, 176.

(d) 2 Swan. 342.

(h) 10 Ves. 195.

(b) 2 Sim. 162.

(e) 1 Myl. & K. 14th.

(i) 4 Mad. 11.

1840.—*Davies v. Hopkins.*

large debt, which had been contracted under circumstances which do not appear, had been apportioned amongst the several congregations or chapels; and under that arrangement the sum of 600*l.* had been allotted to this particular chapel, with a view not of charging it as a debt, as I understand it, but with a view of having the amount raised by voluntary contributions, and which has not been done. It does not appear, from any thing which is stated, that there was the least obligation of any sort or kind upon any of that body to pay this sum,—no legal, moral or any other obligation, or any thing that subjected the parties to any sort of liability. I confess I have great difficulty in allowing as a legacy that alleged debt, which was to be paid under these circumstances. I say it with some regret, because I cannot help suspecting that the testator really meant it; but if he meant it, he has not so described it.[1]

With respect to the other question, which is, what is to be done with the second moiety of the residue of the testator's estate under the circumstances which have happened; it appears that as to this moiety of the residue, there is a direct gift to the children of Thomas after his *decease, and [*281] a gift over to the children of the daughter upon the death of the son without issue, but it is given so that the shares and proportions and manner are to be the same as the shares of the other moiety. Now, with respect to the other moiety, they are to have nothing till after the death of their mother; and what they are to have in expectation is subject to this, that if they die in the lifetime of Mary Davies, leaving issue, the interest which was given to them, is given to that issue.

I apprehend, that according to the direction here given, they are not to take more in the share which they were to have in consequence of the death of Thomas John, without issue than they were to take in the other share which would come to them after the death of their mother. If so, there is no gift to them of any thing until after that event.

Now, if there is no disposition at all, during the time which is to elapse between the death of Thomas John without issue and the death of Mary Jenkins, we have in this will, as to this matter, an intestacy. But the question is, whether we are not to collect from the clauses in this will sufficient to make a gift by implication. This is unquestionably a case of doubt, as all cases of this nature must necessarily be, but I confess I think that there is here by implication a gift to Mary Jenkins for her life. That being so, I think I ought not to go on to make any other declaration, because I do not know who may be the proper parties to contest the rights. I think I cannot now go further than to declare that Mary Jenkins is by implication entitled for her life.[2]

[1] As to legacy void for uncertainty, see further *Baker v. Newton*, ante, 112. *Jubber v. Jubber*, 9 Sim. 503.

[2] Where a testator being seized of a dwelling-house and farm, and of other estate, both real and personal, gave a pecuniary legacy to his daughter, payable at twenty-one, or on her marriage;

1840.—Cooper v. The Earl of Waldegrave.

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*COOPER v. THE EARL OF WALDEGRAVE.

1840: February, 13, 14.

A bill of exchange was drawn and accepted in Paris, and made payable in England. The drawer and acceptor were living there. No rate of interest was expressed to be payable on the bill: Held, that the default being made in England, interest was payable according to the English and not the French law.

As to contracts merely personal, it is a general rule, that questions relating to the validity and to the interpretation of a contract are to be governed by the law of the country where the contract was made; and if a remedy for non-performance of a contract is sought in another country, the mode of suing, and the time within which the action must be brought, are to be governed by the law of the country in which the action is brought.

THE question in this case was, at what rate interest was payable on three bills of exchange, dated in 1829, and amounting together to 800*l.* which had been drawn by W. F. Maturin upon, and accepted by, the Earl of Waldegrave. Both the drawer and acceptor were then resident in Paris. The bills were payable in London to W. F. Maturin, or order, five months after date; but no particular rate of interest was stated to be payable on the face of the bills.

The bills by endorsement became the property of one J. P. Mottet; and in this, which was a creditor's suit, he claimed the amount of principal with interest at 6 per cent.

and gave to his wife the house and farm and his furniture for life, and one-third of his personal estate absolutely, and then concluded as follows: "And after the death of my wife, in case I should have no more children, I give, devise and bequeath unto my said daughter E. L. my said dwelling house and farm, together with all the rest and residue of my personal and real estate;" it was held, that the wife did not take a life estate in such residue by implication. *Rathbone v. Dyckman*, 3 Paige, 9. The introductory remarks of Mr. Chancellor Walworth, in his opinion in that case, are cited by the Editor, (3 Myl. & Cr. 613, n. 1.) The following extract which is in immediate sequence, applies directly to the decision in the text. The Chancellor says, (p. 27,) "It is upon the principle of carrying into effect the supposed intention of the testator that all the cases of devises and bequests by implication have been decided. If the particular devise or bequest cannot reasonably be accounted for, except upon the supposition that the testator intended to make the corresponding disposition of other parts of his property, or of previous estates therein, the court will carry into effect the intention of the testator, by implying such corresponding disposition. Thus, if the devisor gives to his heirs at law the whole or any portion of his real estate, after the death of his wife, and there is nothing in the will from which that particular devise can reasonably be accounted for, except upon the supposition that the decedent [deceased] intended to give the wife the use of the property in the meantime, the law supplies the deficiency in the presumed intention of the testator, and gives to the wife a life estate by implication. On the other hand, if the particular devise or bequest can be reasonably accounted for, taking the whole together, without supposing that the testator must have intended to make some corresponding disposition of other parts or previous estates therein, not expressed, such corresponding disposition will not be implied. An implication may also be rebutted by an implication which is equally strong. Thus, if a testator should devise his estate to his wife during her widowhood only, and to his heir at law after the death of his wife, the limitation in the first devise could not be reasonably accounted for, upon the supposition that the testator intended his wife should enjoy the estate after her second marriage, and consequently, it would rebut the presumption arising from the last devise, that he intended to give her an estate for life absolutely. In such a case, upon the second marriage, the estate would go to the heir at law."

1840.—Cooper v. The Earl of Waldegrave.

By the law of France, 6 per cent. is payable on mercantile instruments; (a) and the question was, whether interest after this rate, or English interest after the rate of 5 per cent., was payable on these bills.

The Master was of opinion that 6 per cent. was payable.

The plaintiff took exceptions to this report.

*Mr. Stuart and Mr. Wray, in support of the exceptions. [*283]

Mr. Pemberton, Mr. Griffith Richards and Mr. L. Lowndes, contra.

The following cases and authorities were cited :—2 Fonblanque Equity, (b) *Montgomery v. Bridge*, (c) *Arnott v. Redfern*, (d) *British Linen Company v. Drummond*, (e) *Thompson v. Powles*, (g) *Gantt v. Mackenzie*, (h) *Orr v. Churchill*, (i) *Auriol v. Thomas*, (k) Bailey on Bills, 157; Story, Conf. Laws, 241, and note 242; Chitty on Bills, 423, 6th ed., *Cougan v. Banks* there cited; 3 Burge's Commentaries, 772, *et seq.*

February 14.—THE MASTER OF THE ROLLS:—The question arises on three bills of exchange which were drawn upon and accepted by the late Earl Waldegrave in France and made payable in England; the same bills were endorsed in France to the now holder; the bills were dishonored when due, and the holder has claimed the amount, with interest at 6 per cent., against the estate of the acceptor; and the Master having allowed the claim, the question upon the exception which remains undisposed of is, whether interest is to be allowed according to the law of France or according to the law of England.

For the exceptant it is said, that although the contract was made in France, yet, as the exceptor's contract was to be performed in England by payment there, the law of England must determine the mode of payment and the consequences of non-payment. [1]

*For the holders of the bills it is said, that the law of France, [*284] where the contract was entered into, must govern the rights of all parties claiming under the contract. [2]

As to contracts merely personal, I apprehend it to be a general rule, that questions relating to the validity and to the interpretation of a contract are

(a) "Les intérêts pour dommages résultant du retard dans le paiement sont fixés à cinq pour cent., sans retenue dans les matières civiles, et à six pour cent dans les matières de commerce, par la loi du 3me Septembre, 1807." 6 Toullier, 280; and see Corps du Droit Français, tom. ii. p. 759.

(b) 438, and note t.

(c) 2 Dow. & Cl. 297.

(d) 2 Car. & P. 38.

(e) 10 Barn. & C. 903.

(g) 2 Sim. 211. [and n. 1, ib.]

(h) 3 Camp. 51.

(i) 1 Hen. Bl. 227.

(k) 2 Term. Rep. 52.

[1] Vide *The King of Spain v. Machado*, 4 Russ. 225. *Hosford v. Nichols*, 1 Paige, 220. *Stewart v. Ellice*, 2 Paige, 504. *Ely v. McClung*, 4 Porter's (Alaba.) Rep. 128. *Quince v. Callender*, 1 Desau. 160. *Fanning v. Consequa*, 17 Johns. Rep. 511. S. C. 3 Johns. Ch. Rep. 587. *Andrews v. Pond*, 13 Peters, 65. *Thompson v. Ketchum*, 4 Johns. Rep. 265.

[2] Vide *Chapman v. Robertson*, 6 Paige, 627. *DeWolf v. Johnson*, 10 Wheat. 367. *Stewart v. Ellice*, 2 Paige, 504. *Fanning v. Consequa*, 17 Johns. Rep. 511. S. C. 3 Johns. Ch. Rep. 587. *Scotfield v. Day*, 20 Johns. Rep. 102.

 1840.—Cooper v. The Earl of Waldegrave.

to be governed by the law of the country where the contract was made, and that if a remedy for non-performance of a contract is sought in another country, the mode of suing and the time within which the action must be brought are to be governed by the law of the country in which the action is brought.[3]

In the present case, the doubt does not arise upon any general rule relating to the subject but from this,—that the contract which was made in one country was to be performed by payment of money in another, and did not itself provide for the consequences of default.

It would seem that cases of this description have frequently come under the consideration of courts in other countries, and more particularly in America; and that it has been held in such cases, the mode of payment and the consequences of non-payment are to be governed by the law of the country in which the payment was contracted to be made. It is singular, that no

[3] The rules in relation to this subject—the exception—and the principles upon which they are founded—are very luminously stated by Mr. J. Story, in the following terms: “Some doctrines are so well established, that it would be a mere waste of time to attempt to defend them. It is for instance, a principle of public law perfectly beyond the reach of judicial controversy, that personal contracts are to have the same validity, interpretation and obligatory force in every other country, which they have in the country, where they are made, or are to be executed. The convenience, nay, the necessities of the civilized and commercial world, rendered it indispensable, that the principle should be adopted in the earliest rational [national?] intercourse; and it would not be easy to trace a period, when it was not tacitly adopted as a pledge of public as well as private confidence. An exception coeval with the rule itself, and resting on the same foundation is, that no nation is bound to enforce or hold valid any contract which is injurious to its own rights, or those of its citizens, or which offends public morals, or violates the public faith. Another rule equally well settled is, that remedies on contracts are to be regulated and pursued according to the law of the place, where the action is instituted, and not by the law of the place where the contract is made. The reason of this rule is extremely obvious. Courts of law are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order, from mere comity to any foreign nation. It is sufficient, if it gives to foreigners the same means to enforce their rights, as it does to its own citizens. There is no hardship or injustice in refusing to foreigners remedies which do not belong to the genius of the government, or its laws; or to repel proceedings or process from its courts, which it does not choose to entertain in cases of domestic litigation. There would be danger as well as inconvenience in a different course; and if it were to produce no other ill effect than the necessary consumption of time in the attempt to learn a strange and novel jurisprudence, it would be a sufficient public mischief to justify the rejection of it. In many cases the form of the remedy is perfectly immaterial. And even where the remedy is more intimately connected with the right, as in the process of execution, there is no absolute reason why a nation should either by arrest of person or property give more prompt efficiency to a contract, than its own citizens can claim, or its general laws justify.” *LeRoy v. Crowninshield*, 2 Mason, 157, 158. And Mr. Chancellor Kent observes: “But on this subject of conflicting laws, it may be generally observed, that there is a stubborn principle of jurisprudence that will often intervene, and act with controlling efficacy. This principle is, that when the *lex loci contractus*, and the *lex loci fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the *land*.” 2 Kent’s Comm. 461. See further *Decouche v. Savetier*, 3 Johns. Ch. Rep. 190, 218. *Chapman v. Robertson*, 6 Paige, 630. *Bentink v. Willink*, 2 Hare, 1. *Berrien v. McLane*, 1 Hoff. Ch. Rep. 427.

 1840.—Price v. Berrington.

case has been found in which the point has been directly determined in the English tribunals; but the cases which have been cited show that the courts in England have decided upon principles which do not in any degree conflict with the principles upon which the courts in other countries have proceeded.

The contract of the acceptor, which alone is now to be considered, is to pay in England; the non-payment *of the money when the bill [*285] becomes due is a breach in England of the contract which was to be performed in England. Upon the breach the right to damages or interest immediately accrues; interest is given as compensation for the non-payment in England, and for the delay of payment suffered in England; and I think that the law of England, i. e. the law of the place where the default has happened must govern the allowance of interest which arises out of that default; and consequently that the exception which relates to the interest is well founded.[4]

At the time when there is a breach of the contract of the acceptor by non-payment in the country where payment is contracted to be made, there may be a cotemporaneous breach of contract by the drawer or endorser in the country where the contract was entered into,—where the bill was drawn and the endorsement made: and the consequences of that breach of contract may be governed by the law of the country where it takes place.[5]

PRICE v. BERRINGTON.

1840: February, 15.

Defendants admitted by their answer, that all persons interested were parties to the suit, and at the hearing objected for want of parties, and the objection prevailed: Held, that having misled the plaintiff, they ought to pay him the costs of the day.

THIS bill was filed to set aside a deed of 1809, on the ground of fraud, and of the vendor being at the time a lunatic. The plaintiff had been found

[4] "The general doctrine is, that the law of the place where the contract is made, is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on lands in another state unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case, the rate of interest of the place of payment is to govern. According to the case of *Thompson v. Pawles*, (2 Sim. 194,) it is now the received doctrine at Westminster Hall, that the rate of interest on loans was to be governed by the law of the place where the money was to be used or paid, or to which the loan had reference; and that a contract made in London, to pay in America, at a rate of interest exceeding the lawful interest in America, was not a usurious contract, for the stipulated interest was parcel of the contract. This is also the law in this country." 2 Kent's Comm. 461. See also *Harvey v. Archbold*, 1 Ryan & Mood. 184. *Hosford v. Nichols*, 1 Paige, 220. 2 Sim. 211, n. 1. *Pratt v. Adams*, 7 Paige, 616. 2 Kent's Comm. 460, n. (c.) and authorities there cited. Story's Conflict of Laws, § 291—306, where both the common and foreign law, on this subject, seem to be nearly, if not quite exhausted.

[5] Vide 2 Kent's Comm. 461. n. (b) Where the above paragraph is cited with little variation, and with evident approbation.

 1840.—*Aldworth v. Robinson*.

lunatic by an inquisition in 1837, which asserted that the lunatic had lucid intervals from the year 1796; he now claimed to have the estate conveyed to him in fee. It appeared, however, that in 1805, he had executed another deed, which gave interest in the estate to his wife and children.

[*286] *In answer to a charge in the supplemental bill, some of the defendants stated, "that they believed it to be true that there were not any other persons than the persons in the supplemental bill named," (viz, those made parties to the suit,) "who had or claimed to have any estate right, title or interest in or to the said estate."

Mr. *Kinderley* and Mr. *Roll* at the hearing, objected that the suit was defective, on the ground that the wife and children were not parties to the suit.

Mr. *Pemberton* and Mr. *Hull*, contra, contended, that as the inquisition found that the plaintiff had been a lunatic from 1796, the deed of 1805 would be equally void with that of 1809, and that the parties claiming under it were not necessary parties; that if the objection succeeded, the defendants, who had made the above admission and thereby misled the plaintiff, ought to pay the costs of the day. They cited *Harvey v. Cooke*.(a)

Mr. *Wood*, for other parties.

THE MASTER OF THE ROLLS :—It is said, that it is clear that the wife and children have no interest, because the finding of the inquisition overrides all the deeds; but the inquisition is not binding on persons who were not parties to the proceeding; as against them it is presumptive evidence only of the time of the lunacy.(b)

On the other point, it is clear that the defendants have misled the plaintiff, by stating that all the necessary persons were parties to the suit; having misled the plaintiff, they must pay him the costs of the day.

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*ALDWORTH v. ROBINSON.

1840; February 17

Form of decree in a foreclosure suit, where A., whose estate was already mortgaged to the plaintiff, joined B., as his surety, in a mortgage to the plaintiff of both their estates for a further sum. An application to the Master of the Rolls, on the certificate of plaintiff's counsel, to advance a cause as a short cause, was refused on the defendant's counsel stating that it was not a short cause, and the costs of the motion were reserved. The cause afterwards came on in its regular course, when the court, being of opinion that the cause was a proper one to be heard as a short cause, gave to the plaintiff the costs of the motion.

In 1826, Mr. Lindsey's estate was subject to several mortgages, amounting to 5000*l.*, and which, by a transfer in that year, became vested in the plaintiff.

In the same year, Mr. Robinson applied to the plaintiff, Mr. Aldworth, for

(a) 4 Russ. 34.

(b) *Frank v. Mainwaring*, ante, p. 115. [126, n. 1.]

1840.—Aldworth v. Robinson.

the loan of 6000*l.* on mortgage of his estates, which the plaintiff agreed to advance on Lindsey also securing the sum on his estates; Robinson and Lindsey accordingly mortgaged their respective estates to the plaintiff for the sum of 6000*l.*; they afterwards, in 1828, executed to the plaintiff a further charge on their estates for 500*l.*

The plaintiff having, as before stated, obtained a transfer of the mortgages on Lindsey's estate for the 5000*l.*, filed this bill of foreclosure.

The plaintiff, in May, 1839, moved that the cause might be advanced and heard as a short cause, but the application was refused on the ground of its being a foreclosure suit.^(a) After the general order of the 9th of May, 1839,^(b) the motion was repeated on the certificate of the plaintiff's counsel of its being a short cause. The defendant's counsel having stated his opinion that it was not a proper cause to be heard as a short cause, the Master of the Rolls at once refused the application, but reserved the costs of the motion until the hearing.

*The cause now came on for hearing, and the only questions were, [*288] as to the form of the decree, and as to the costs of the motion which had been reserved.

Mr. *Pemberton* and Mr. *G. Russell*, for the plaintiff, cited *Becket v. Micklethwaite*.^(c)

Mr. *Willcock* and Mr. *Roupell*, contra, for the defendants.

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS:—It appears in this case that there were several mortgages amounting to 5000*l.* upon Lindsey's estate before the year 1826. In the year 1826, Robinson mortgaged his estate, which is quite distinct, for the sum of 6000*l.*; and at the same time, Lindsey executed deeds, whereby he made his estate, called the Grove End Farm, which was then subject to prior debts amounting together to 5000*l.*, liable for Robinson's mortgage for 6000*l.* In the year 1823, the further sum of 500*l.* was raised by Robinson, and upon that occasion Lindsey executed a deed, by which he added the 500*l.* to the charge previously subsisting upon his estate; the consequence of which is that Lindsey's estate is charged with the original sum of 5000*l.*, and also with the additional sum of 6500*l.*, but Robinson's estate was never subject to more than the 6500*l.*, care therefore must be taken not to charge it with more. The plaintiff being entitled to both the debts, there must be an account taken of what is due to him upon each of them; and upon payment of both, Lindsey's estate is to be redeemed, but Robinson's estate must be made subject to the 6500*l.* only.

*As to the costs of the motion, I think the plaintiff entitled to [*289] them, for all that was required in this case to be brought before the court was a simple statement of the facts.^(d)

(a) 1 Beavan, 99, note (d). (b) *Ib.* x. (c) 6 Mad. 199; and Seton on Decrees, 175.

(d) For the decree in this case see Reg. Lib. A. 1839, fo. 874. It will be found rather complicated in consequence of the death of Lindsey, and of his having devised part of his mortgaged estate

1839.—Wood v. Hitchings.

WOOD v. HITCHINGS.

1839 : December 9. 1840 : February 18.

An appeal was pending in the Privy Council from a sentence of the Ecclesiastical Court rejecting the testamentary papers of the deceased and declaring an intestacy ; limited administration *pendente lite* had ceased by the sentence, and an inhibition had issued from the Privy Council which inhibited the Ecclesiastical Court proceeding. There being no person in the mean time authorized to protect and collect the estate, Held, that these circumstances, of themselves alone justified the appointment of a receiver by this court.

Held also, that a receiver might in such a case be granted on the application of a party appellant, who, assuming the decision of the Ecclesiastical Court to be correct, had no interest in the estate of the deceased.

And thirdly that the circumstance of there being no person in whose name an action might be brought to recover the property is not a sufficient objection to the appointment of a receiver.

JAMES WOOD, of Gloucester, banker and mercer, died on the 20th of April, 1836, possessed of property stated to amount to nearly 1,000,000*l.* sterling. On his death two testamentary papers, wafered together and dated respectively the 2d and 3d of December, 1834, were propounded for probate in the Prerogative Court, by Mr. Chadborne, Mr. Osborn, Mr. Surman and the plaintiff, Sir M. Wood ; the effect of these papers conjointly, was to appoint these four gentlemen executors, and to give them the whole of the residuary real and personal estate of the testator. The validity of these instruments being disputed by parties claiming to be the next of kin of the deceased, a suit, in consequence, arose in the Prerogative Court.

[*290] *Pending these proceedings, a third testamentary paper of the deceased, dated July, 1835, was sent anonymously by post to one of the alleged next of kin under very extraordinary circumstances. This paper was torn and partly burnt, and referred to a prior codicil which had never been produced ; it was accompanied by a pencil writing, stating that the enclosed had been saved out of many burnt. This paper bequeathed legacies to a considerable amount, and gave the rest of the property of the deceased to his executors. This paper was also propounded by some of the legatees claiming under it.

On the 4th of June, 1836, by an interlocutory decree, letters of administration pending the suit, and limited to the sale of 4243*l.* stock and to the receipt of the rents, and to the management of the leasehold estates, and to the payment of all sums due from the deceased on account of his banking concerns, was granted by the Prerogative Court to Mr. Maddy.

On the 20th of February, 1839, the Prerogative Court decided against the force and validity of the three several testamentary papers, and consequently that the deceased died intestate.

The plaintiff, together with Chadborne and Osborn, appealed to the Privy Council from this decision, as did some of the legatees claiming under the

to his daughter Lydia, discharged of all mortgages, &c., and his residuary real and personal estate to the defendant Robinson.

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third instrument. That court, according to the usual course of practice, issued an inhibition, whereby the Prerogative Court was inhibited and restrained from further proceeding in the said suit, or upon the sentence or decree pronounced therein.

This bill was filed on the 3d of August, 1839, by Sir M. Wood alone, against the other alleged executors, the next of kin of the deceased, some of the legatces *under the third instrument, and Mr. Maddy, [*291] stating the above facts, and further stating, that the suit in the Prerogative Court being no longer pending, the administration granted to Mr. Maddy had determined, and that there was not, as the plaintiff was advised, any person having any lawful power or authority to sell the stock in trade, furniture, plate and other household effects remaining unsold, or to collect, get in or receive the debts or the interests thereon, or the rents and profits of the leasehold estates, or the dividends and interest of said stocks and funds.

The bill contained very searching and minute inquiries as to the third alleged testamentary paper, as to the evidence of its execution and of its being signed, and all the circumstances connected with its being brought forward, and the result of all inquiries in respect of the same; and it prayed that the defendants, who were the alleged next of kin and the parties claiming under the third testamentary paper, who were respondents in the appeal to the Privy Council "might make a full disclosure and discovery of the matters aforesaid, and that the plaintiff might have the benefit thereof," and that the personal estate of the deceased might be secured pending the appeal and until a legal personal representative of the deceased should be duly appointed, and that in the meantime a receiver might be appointed, and that an account might be taken of the receipts and payments of Edwin Maddy in respect of the personal estate of the deceased.

It appeared in the Ecclesiastical Court, that the first and second testamentary papers, though propounded together, had been wafered and placed in an envelope by one of the executors, and the court, in giving judgment, had observed strongly on the mode in which the *case had been [*292] brought forward by the executors, whom it condemned in costs.

It appeared, also, that the plaintiff in this case had filed, on the 27th of July, another bill similar to the present, and marked it "before the Lord Chancellor," and in which he had given a notice of motion before the Vice-Chancellor similar to the present, but that on the 1st of August, the plaintiff obtained an order of course to dismiss the bill, and on the 3d of August filed this bill, and gave a notice of motion before the Master of the Rolls similar to that before given in the Vice-Chancellor's court.

A motion was now made on behalf of the plaintiff for a receiver of the personal estate of the deceased.

Sir C. Wetherell, Mr. Turner and Mr. Bethell, for the motion, contended that the administration *pendente lite* to Mr. Maddy, which was limited to a particular part of the testator's property, had expired upon pronouncing the

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sentence of the Ecclesiastical Court,—that the functions of that court were wholly suspended by the writ of inhibition,—and that under the Privy Council act^(a) the Judicial Committee had no power of appointing an administrator pending the appeal. That in this state of circumstances the property of the deceased was wholly without protection and subjected to great prejudice, and that it would be evidently for the benefit of all parties interested, that a receiver should be appointed. They referred to the following authorities in support of this jurisdiction. *Richards v. Chave*,^(b) *Knight v. Duplessis*,^(c) *King v. King*,^(d) *Atkinson v. Henshaw*,^(e) *Walker v. Walker*,^(g) [*293] *Ball v. *Oliver*,^(h) *Liddell v. Liddell*,⁽ⁱ⁾ *Watkins v. Brent*,^(k) *Day v. Croft*,^(l) and *Blake v. Blake*.^(m)

They also argued, that the plaintiff ought not to be prejudiced in the application by any misconduct of his co-executor in which the plaintiff had no participation.

Mr. Kindersley, Mr. L. Wigram, Mr. Richards and Mr. Joliffe, for the alleged next of kin.

Mr. Pemberton and Mr. S. Sharpe, for the legatees under the third testamentary instrument, opposed the appointment of a receiver, contending that the plaintiff had been guilty of great laches and of improper conduct by commencing and abandoning similar proceedings before the Vice-Chancellor; that in respect also of the proceedings adverted to in the Ecclesiastical Court, he was not *rectus in curia*, and according to the decision then still unreversed, he had no interest in the estate of the deceased. That this was an attempt indirectly to obtain a discovery in aid of proceedings in the Ecclesiastical [*294] *Court, which could not be had directly,⁽ⁿ⁾ and that the bill in reality was a mere bill of discovery, and not filed *bona fide* for the protection of the estate. That the plaintiff ought either to obtain an administration *pendente lite* from the Privy Council, who, under the act of the 2 & 3 W. 4, c. 92, had the same power which the delegates formerly had to grant it, or from the Prerogative Court, and ought not to be allowed, after four years' litigation in another court, now to change the jurisdiction. And lastly, that

(a) 2 & 3 W. 4. c. 92.

(b) 12 Ves. 462.

(c) 1 Ves. sen. 324.

(d) 6 Ves. 172.

(e) 2 Ves. & B. 85.

(g) 2 Ves. & B. 91, note b.

(h) 2 Ves. & B. 96.

(i) Cited 12 Ves. 464.

(k) 1 Myl. & Cr. 97.

(l) Rolls, 5th Nov. 1838.

They stated the case to be as follows.

There was a suit in the Ecclesiastical Court, as to the validity of the appointment by a codicil of a Mr. Dufour to be an executor. That Court decided against the codicil, and displaced Mr. Dufour's title. He appealed to the Privy Council, and an inhibition issued to restrain the Ecclesiastical Court from further proceedings; and upon a bill by persons interested under the will, the court appointed a receiver, on the ground of there being no person to protect the property, and no power elsewhere to appoint one.

(m) Exchequer, Michaelmas term, 1828, thus stated by Mr. Bethell. A decree for probate had been made by the Prerogative Court, and an appeal to the delegates being pending, C. Baron Alexander, notwithstanding the opposition of the executors, to whom probate had been decreed, granted a receiver.

(n) Mitford 186, and *Dun v. Coates*, 1 Atk. 268.

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the appointment of a receiver would be nugatory, as there was no person in whose name he could sue to recover the property.

[THE MASTER OF THE ROLLS :—Is there any case in which the court has refused to appoint a receiver pending a litigation in the Ecclesiastical Court, on the ground that there was no legal personal representative? Has this court ever allowed a person who admits a sum of money to be due from him to an estate, to dispute the right of the receiver to collect it?]

The Bank of England would not pay and would be justified by the acts of Parliament, and the receiver would have no means of compelling payment from the debtors to the estate who might dispute the debt. [THE MASTER OF THE ROLLS :—Then the court would put the matter into a course of investigation.] *Jones v. Goderich*, (a) was referred to.

Mr. Dixon, for Mr. Surman, opposed the application principally on the ground that there was a suit pending in the Vice-Chancellor's court for the same purpose in which the next of kin were plaintiffs, and which would be the most proper suit in which to apply for a receiver.

*Mr. Beales, for Mr. Osborn, and Mr. Girdlestone, for Mr. Maddy, [*295] submitted to any order.

Sir C. Wetherell, in reply, contended, that even if protection for the property could be obtained through the medium of the Ecclesiastical Court or the Judicial Committee, still the jurisdiction of this court would not be ousted; that both in *Liddell v. Liddell*, and *Day v. Croft* the receiver had been appointed pending an appeal.

THE MASTER OF THE ROLLS said he would read the bill and affidavits before giving his decision in this case, but that he could not permit any doubt to be entertained respecting the jurisdiction of this court in a case of this description. That it was perfectly clear to him, that the court had jurisdiction to interfere by granting a receiver for the protection of the estate, and that it was not necessary in order to authorize the court to appoint a receiver, that there should be a person in whose name an action might be brought to recover the property. That the question here was, whether it was necessary for the protection of the interests of all parties concerned that there should be a receiver.

1840: February 1.—THE MASTER OF THE ROLLS :—This was a motion for a receiver of the personal estate of James Wood, deceased, who died at Gloucester on the 28th of April, 1836.

After his death the plaintiff, together with Mr. Chadborne, Mr. Osborn and Mr. Surman, alleged that in the month of December, 1834, he had made a will, and thereby appointed them executors.

*Some time afterwards, it was alleged by other persons that the [*296] testator had made a codicil or testamentary paper, dated in July,

(a: Before the Lord Chancellor, Nov. 21, 22, 1839. [This case when before Shadwell, V. C., is reported, 10 Sim. 327, together with the order made by the Lord Chancellor on appeal.]

1840.—Wood v. Hitchings.

1835, and some of the testator's next of kin alleged that the testator died intestate.

Proceedings in the Prerogative Court of Canterbury were instituted for the purpose of having it determined whether the deceased Mr. James Wood died testate as to the papers propounded, or any of them, or not; and on the 4th of June, 1836, a limited administration *pendente lite* was granted to Mr. Maddy.

Sentence was pronounced on the 20th of February, 1839, and it was declared that the several testamentary papers which had been propounded were void, and that the deceased died intestate.

The effect of this sentence was to deprive the plaintiff, and the other persons claiming to be executors under the paper of December, 1834, of all right to and interest in the effects of the deceased, and at the same time to determine the limited administration *pendente lite* which had been granted to Mr. Maddy.

The plaintiff, and the other persons claiming to be executors, have appealed from the sentence to the Queen in council, the case is referred to the Judicial Committee, and an inhibition against further proceedings in the Ecclesiastical Court has issued, the litigation between the parties is transferred to the Court of Appeal, and is now pending, and in the meantime there is no person legally entitled to receive any part of the effects of the deceased.

These circumstances standing alone appear to me to authorize the court to interfere for the protection of the property, which consists not only of [*297] a very large sum of money in the funds, but also of leasehold estates, of stock in trade, and debts of considerable amount.

The application, however, is made by the plaintiff alone; every other person who, in any view of the case, may be interested in the estate, opposes the application; some on the ground that the circumstances of the case do not afford sufficient reason for the exercise of the discretion upon which the court ought to act in such cases, others on the ground that a receiver ought not to be appointed at the instance of the plaintiff on this bill.

I think that there is nothing in the circumstances of the case, so far as they regard the situation of the testator's property, to make it inexpedient to appoint a receiver, and that the plaintiff is, for his own interest, entitled to the receiver, unless debarred by some personal objection.

As to the personal objections to the plaintiff and this bill. I do not think the bill a proper bill for the mere protection of the property; it is undoubtedly, to a great extent, a bill of discovery; [1] but, having regard to the state of this cause, I cannot venture to say that the circumstance of discovery being sought by this bill is a ground for refusing a motion for a receiver.

It is said that the plaintiff does not come with clean hands; but the allegation takes for granted the principal point in dispute. If the sentence is to

[1] A bill for a receiver, pending a litigation as to probate, ought not to seek discovery in reference to the merits on that litigation. *Wood v. Hitchings*, 3 Beav. 504.

1840—Holmes v. Bell.

stand the plaintiff is subject to great imputation; but he insists that he ought to be cleared, and that is a matter which is to be tried in the Court of Appeal.

*The same observation applies to the objection that he is at present [*298] without interest; he is so if the sentence stands, and that is the question to be tried.

I have also considered the objection which is raised on the ground of delay, and I do not think that there is any such delay proved as to make the application improper at this time; and, on the whole, I think a receiver ought to be appointed.(a)

HOLMES v. BELL.

1840: February 22.

Two parties, who were entitled to property in equal moieties, made an equitable mortgage of it; one of the mortgagors was out of the jurisdiction, and the whole rents were received by the other. The court granted a receiver.

THE defendants, William Bell and Edward J. Bell, being seised in equal moieties in fee simple of the property mentioned in the pleadings, deposited the title deeds thereof with the plaintiffs, the Hull Banking Company, and agreed, when required, to execute to them a legal mortgage for securing any moneys due from William Bell to the company within a certain limit.

A considerable sum having become due from William Bell to the company, the latter filed a bill of foreclosure against William and Edward J. Bell.

William Bell appeared and answered, but Edward J. Bell was living out of the jurisdiction and had not been served with a *subpœna*, and a motion was now made for a receiver of the entirety of the rents and profits.

It appeared that William Bell was in the receipt of the whole of the rents of the premises.

*Mr. Pemberton and Mr. Goodeve, for the motion. [*299]

Mr. Bethell, contra, insisted that the court would not grant a receiver in the absence of the party principally interested, and that to the extent at least of the interest of Edward J. Bell, who was absent, the motion could not be granted: *Brown v. Blount*,(a) *Coward v. Chadwick*,(b) *Tanfield v. Irvine*.(c)

That no difficulty existed here, because, under the recent statutes, an order might be obtained for making service abroad good service.

Mr. Pemberton, in reply:—The case of *Brown v. Blount* arose at the

(a) Affirmed by the Lord Chancellor, March 13th, 1840. [S. C. 3 Beav 504. See further *Marr v. Littlewood*, 2 Myl. & Cr. 454. *Jones v. Goodrich*, 10 Sim. 327, 328, n. 1. *Rendall v. Rendall*, 1 Hare, 152.]

(a) 2 Russ. & M. 83.

(b) 2 Russ. 150.

(c) 2 Russ. 149.

1840.—*Miles v. Presland.*

hearing; besides, in this case, the defendant William Bell is in possession of the whole property. The receiver will protect the property for the benefit of all parties.

THE MASTER OF THE ROLLS:—With respect to the moiety of the party who appears there can be no doubt, but as regards the moiety of the absent party there is some difficulty; and if the case of *Brown v. Blount*, applied I could not act in opposition to it without great consideration; but in this case the defendants are tenants in common, and the one who is before the court is in possession of the whole rents; and under these circumstances I think that a receiver of the whole rents ought to be appointed.[1]

[*300]

*MILES V. PRESLAND. IN RE COE.

1840: February 19, 25.

A court of equity has no jurisdiction under the 1 & 2 Vict. c. 110, s. 14, to order moneys invested in the name of the Accountant General to stand charged with a judgment debt recovered at law against the party entitled to such funds.

MR. COE had obtained judgment in the Exchequer of Pleas against H. M., a defendant in this cause.

H. M. was entitled to one-fifth share of a sum of money in the funds, standing in the name of the Accountant General, in trust in this cause.

MR. HALLETT now moved, on behalf of Mr. Coe, under the 1 & 2 Vict. c. 110, s. 14, (the act for the abolition of imprisonment for debt,) for an order nisi that unless cause shown, the one-fifth of the fund in court should stand charged with the amount of the judgment debt. He stated that such orders had been made by the Vice-Chancellor.

By the act in question it is enacted, that if any person against whom any judgment shall have been entered up in any of her Majesty's *superior courts at Westminster*, shall have any government stock, funds or annuities, or any stock or shares of, or in any public company in England, (whether incorporated or not,) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them, or such part thereof respectively, as he shall think fit, shall stand charged with the payment of the

[*301] amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favor by the judgment debtor.

The next section enacts, that to prevent the person against whom the judgment has been obtained from disposing, &c., of the stock, every order charg-

[1] *Vide 2 Russ. 152, n. 1.*

 1840.—Bennett v Fowler.

ing the stock, &c., shall be made in the first instance *ex parte*, and shall be an order to show cause only.

THE MASTER OF THE ROLLS said he entertained great doubts whether the act in question authorized courts of equity to make the order which was asked: he would however, read the act and affidavits, and make inquiry as to the orders made by the Vice-Chancellor. His Lordship suggested, whether the proper mode of proceeding would not be to get the charging order in the court of common law, and then come here by petition for the ordinary stop order.

February 25.—THE MASTER OF THE ROLLS said he found that such an order had been made by the Vice-Chancellor; that his Lordship had read the act, but he still conceived he had no authority to make the order: he therefore thought that the more satisfactory course would be to make an application to the Lord Chancellor.(a)

*BENNETT v. FOWLER.

[*302]

1840: February 25.

A bill prayed the specific performance of an agreement, "if a good title could be made." At the hearing it was declared that the agreement ought to be specifically performed, and it was referred to the Master to inquire whether a good title could be made. The Master reported in the negative. The plaintiff on further directions waived all objections to the title, and proposed to take the property; this was resisted by the vendor: Held, that the plaintiff was entitled, but being aware at the first hearing, of the objections to the title, he ought to pay the costs of the investigation in the Master's office.

FOWLER, being indebted to the plaintiff, agreed to sell him certain freehold premises for 525*l.*, and it was agreed that the debt should be retained out of the purchase-money.

The plaintiff filed his bill, praying a specific performance of the agreement, "if a good title could be made" against the personal representative and heir at law of Fowler; they, by their answers, insisted that the agreement had been waived; a decree was however made whereby it was declared that the agreement ought to be specifically performed and carried into execution; and it was referred to the Master to inquire and state to the court whether a good title could be made to the property.

The Master reported that a good title could not be made, and the cause now came on for further directions.

Mr. Pemberton and Mr. Wood, for the plaintiff, proposed to waive all objections to the title and to take the property.

(a) Note.—An application was afterwards made to the Lord Chancellor, who, after conferring with the Master of the Rolls and Vice-Chancellor, decided that the court had no jurisdiction to make the order. (11th March, 1840.) See the subsequent act of the 3 & 4 Viet. c. 82. [The case before the Lord Chancellor is reported 4 Myl. & Cr. 431.]

1840.—Bennett v. Fowler.

Mr. *G. Turner* (in the absence of Mr. *Tinney*) resisted a specific performance of the agreement, and contended that the bill must be dismissed; he argued that, as it now appeared that a good title could not be made, the prayer of the plaintiff's bill could not be granted; that the court could not decree the performance of an agreement for the sale of a pretended title, or order [303] the conveyance of an estate to which the defendant was "not entitled, as it would be contrary to the statutes against maintenance and champerty. That if the bill had alleged the truth, namely, that the defendant had no title, it would have been dismissed,(a) and that the result must be the same now that fact appeared judicially. That, if dismissed, the bill must be dismissed with costs, as the plaintiff when he filed his bill was aware of the objection; that if the plaintiff should succeed, he ought to pay the costs of the investigation in the Master's office, as, if he had consented to take the title at the original hearing, the expense of the reference would have been saved.

That the declaration in the decree that the contract ought to be specifically performed, did not prevent the court dismissing the bill, now that it appeared that the defendants could not make a good title. *Warren v. Richardson*.(b)

Mr. *Wood*, in reply.

THE MASTER OF THE ROLLS:—The bill prayed a specific performance of the agreement, "if a good title could be made." Having regard to the duty of a vendor to make a good title, it appears to me immaterial whether these words were there or not. If a plaintiff prays the specific performance of an agreement, he does not intend to take the property if there is no title. The allegation of the defendants was, that the agreement has been waived, but at the hearing a decree for specific performance was pronounced, and a reference was directed to the Master to see if a good title could be made.

Under that decree it was the duty of the vendor to make out a good [304] title, and the right of the other party to have it; but I do not know "any reason why the purchaser who has that right may not, if he thinks fit, dispense with the performance by the other party of his duty, and waive carrying in objections to the title; he insisted, however, on the objections to the title, and the result was that the Master reported that a good title could not be made; this means, not that the parties have no title at all, but that they cannot make out such a title as the plaintiff is bound to accept. The plaintiff now says, I am willing to waive all the objections, and to accept the title which can be made: the question is, if he has not a right to say so. I am of opinion that the obligation to which a vendor is subject to make out a title is intended for the benefit of the purchaser only, and that if he thinks fit to waive it, he has a right to do so.[1]

I think, therefore, the plaintiff has a right to have the agreement specifically performed, so far as it can be, and it being admitted that the plaintiff at

(a) *Nicholson v. Wordsworth*, 2 Swan. 369.

(b) 1 Younge, 1.

[1] Vide *Besant v. Richards*, Tambl. 509. *Westervelt v. Matheson*, 1 Hoff. Ch. Rep. 37. *Tanner v. Smith*, 10 Sim. 411.

1840—Hue v. Richards.

the hearing was acquainted with the objections to the title, he must bear the costs of investigating the title; the other costs ought to be borne by the defendants.[2]

*HUE v. RICHARDS.

[305]

1839 : November 7.

By articles of partnership, in case of the death of a partner the survivor was to pay the amount of his capital according to the last half yearly rest, and to take the stock, &c. After the death of one, a different arrangement was entered into between his executors, (one of whom was the surviving partner,) and his widow, who was beneficially interested under the will, by which the surviving partner was to take the stock at a valuation, and get in the credits, and pay the joint debts, and out of the share of the deceased partner in the surplus, to pay his separate debts and the widow's legacy. The widow by this bill sought to set aside this arrangement for fraud, and to have an account of the partnership transactions, and of the profits subsequent to her husband's death: Held, that the plaintiff was entitled to the production of the accounts of the business, as carried on after the testator's death.

MESSRS. RICHARDS and Hue carried on business in partnership together, under articles of partnership whereby it was agreed, that in case of the death of either of the partners, the survivor should not be obliged to account for the stock and profits, but should give security to pay within six months so much as upon the last half-yearly rest should appear to be due to the deceased partner, and the capital, stock, &c., were thereupon to be conveyed to the surviving partner.

Hue died in 1835, and he appointed his partner Richards and a Mr. Underwood his executors, who proved his will. By his will he bequeathed to the plaintiff, his widow, 2000*l.* and a life interest in the residue of his property. Upon the death of Hue the above stipulation in the partnership deed was not carried into effect, but an arrangement was entered into between the widow and the executors, by which the surviving partner (being one of the executors) was to take the partnership stock, &c., at a valuation which had been previously made; and he was to get in the credits, and pay the partnership debts; the share of Hue in the residue being ascertained, was to be applied in payment of his separate debts, and the residue was to be then applied by instalments in satisfaction of the plaintiff's legacy.

*This bill was filed by the widow against the executors, and [306] sought to set aside this arrangement by various suggestions of fraud, and prayed also for an account of the partnership dealings, &c., and of the profits made by the surviving partner by means of the capital of the deceased partner.

All fraud was denied by the answer.

[2] Vide *Scoones v. Morrell*, 1 Beav. 251. *Reeves v. Gill*, id. 378, 379. *Taylor v. Brown*, ante, 180.

 1840.—Hue v. Richards.

A motion was now made for the production of documents admitted by the defendant Richards to be in his possession ; and the question was, whether the books of account of the trade since the death of Hue were to be ordered to be produced.

Mr. *Pemberton* and Mr. *O. Anderdon*, for the plaintiff.

Mr. *Girdlestone* and Mr. *Roupell*, contra, contended that the plaintiff was not entitled to the documents relating to the business carried on subsequent to the testator's death. That the court would be compelled to decide the previous question as to the validity of the arrangement, before it would hold that the plaintiff was entitled to see the private accounts of the defendant. That even if that arrangement were set aside, then the plaintiff would be remitted to her original position under the partnership articles, and the estate of the testator would be entitled only to the share of the deceased partner according to the previous half-yearly rest, and would not be entitled to participate in the subsequent profits.

THE MASTER OF THE ROLLS (without hearing a reply.)—The documents, the production of which is objected to, are those which show the [*307] dealings with the joint property after the death of one of the partners, and which the defendant calls his private accounts. I do not now intend to enter into the merits, but it appears that after the death of Mr. Hue an arrangement was made with the plaintiff and the executors, the whole of which the plaintiff says ought to be set aside. She says that in the valuation which was the foundation of the arrangement, she was not rightly treated, and that she is entitled to an account of the application of that, which at the death of her husband, was the joint property of her husband and the surviving partner ; and she prays relief accordingly. It is said, in answer to the present motion, that if this arrangement is set aside, the plaintiff will be remitted to the partnership articles, and that then she will only be entitled to the value of the testator's capital as therein pointed out. I do not say that that will be the result of the case, or that she may not be entitled to the relief asked ; she may become entitled to an account of the partnership property since her husband's death ; and if so, she will be entitled to these accounts kept by the defendant. It is said that the form of the prayer of the bill is erroneous, but there is no plea or demurrer to it. The plaintiff has a right to the production with reference to the relief asked by the bill, and which may possibly be had at the hearing of the cause.

1839.—Bebb v. Beckwith.

*BEBB v. BECKWITH.

[*308]

1839: November 22, 26.

Bequest in trust for all the children of the testator's late uncle J. B. deceased, to be divided equally amongst them, and the issue of such of them as should be deceased, share and share alike, such issue to be entitled to the share of his deceased parents, equally amongst them: Held, that a grand-child of J. B. whose parent was dead at the date of the will, was entitled to take.

THE question in this case was, whether James Beckwith, the son of a son of James Beckwith deceased who was dead at the date of the testator's will, was entitled to a share of the funds in question.

The testator directed his trustees to stand possessed of property, in trust, for all and every the children of his late uncle, James Beckwith, deceased, to be divided equally amongst them and the issue of such of them as shall be deceased, share and share alike, such issue to be entitled to the share of his, her or their deceased parents equally amongst them, subject, &c.

The father of the claimant was one of the children of the testator's uncle, James Beckwith, deceased; but he was dead at the date of the will.

Mr. Pemberton and Mr. Ruppell, for trustees.

Mr. Stinton, for James Beckwith the claimant, cited *Tytherleigh v. Harbin*.(a)

Mr. Piggott, for the surviving children of the uncle, contra, contended that the issue took only the share of the parent by way of substitution, and as here the parent could take nothing, being dead at the date of the will, his child could not be substituted; he cited *Christopherson v. Naylor*, b)

Butter v. Ommaney,(c) * *Waugh v. Waugh*,(d) *Smith v. Smith*,(e) [*309] *Collins v. Johnson*,(g) *Giles v. Giles*.(h)

THE MASTER OF THE ROLLS:—The funds, it is to be observed, are to be held for all the children of James Beckwith, deceased, to be divided equally, not amongst those children, but amongst them and the issue of such of them as shall be dead at the period of distribution, which was the future time contemplated by the testator, and imported by the words I think that the words are applicable to the cases of children who might die before or after the date of his will, provided they were dead at the future period in contemplation, and I consider the direction to be, in effect, to hold the fund in trust for division amongst the children then living, and the issue of such of them as may be then dead; and the testator having used the words "share and share alike," follows them up with a direction, that the issue of a child were to take amongst them only a child's share, the effect of which, I think, is to limit the amount of the share to which the issue are entitled, but not to make the gift to issue a gift which could only take effect by way of substitution for the gift to a child living at the date of the will.

(a) 6 Sim. 329.

(b) 1 Mer. 320.

(c) 4 Rnm. 7.

(d) 2 Myl. & K. 41.

(e) 8 Sim. 353.

(g) 8 Sim. 356.

(h) Ib. 360.

 1840.—*Dickenson v. Lord Holland.*

I have read the cases : *Christopherson v. Naylor* and *Butter v. Ommaney*, which are, I think, clearly distinguishable. In *Waugh v. Waugh* there was a separate provision made by the will for the child excluded on the construction upon it; and I think that the authorities do not prevent me from putting upon the words the construction which they appear properly to bear.[1]

[*310]

*DICKENSON v. LORD HOLLAND.

1840: February 14.

Under a trust deed dated 1806, and which was to operate during the life of the grantor, the trustee, after the performance of certain trusts, was to pay the surplus rents to the owner during his life. The owner died in 1816, the trustee died in 1818; and in 1828 a bill for an account was filed by the representative of the former against the representatives of the latter. The answer was filed in the following year, but no further proceedings were taken in the suit until 1839, when the cause was set down and was heard in 1840: Held, that no such laches existed as to bar the account: Held also, that as regarded the lapse of time, the case was to be looked at in the same light now as at the filing of the bill.

THE plaintiff was the executor of the late Earl of Warwick, and the defendants were the legal personal representatives of the late Lord Ossory.

In 1806 the late Earl of Warwick executed a deed whereby he gave to the Earls of Galloway and Ossory power to receive the rents of certain of his estates, on certain trusts to pay the costs; and secondly, to pay the sum of 1000*l.* a year to the late Earl of Warwick, and then to make other payments, and to pay the residue, if any, to the late Earl of Warwick; the deed was to continue in force during the life of the Earl of Warwick. The Earl of Galloway died soon after the date of this deed; the Earl of Warwick died in 1816; the Earl of Ossory lived until 1818; and in 1828 this bill was filed by the executor of the Earl of Warwick against the representatives of the Earl of Ossory for an account of the receipts under the deed of 1806, and of the application thereof.

The answer was filed in 1829, and no further proceedings were taken in the suit until January, 1839, when the cause was set down, and now came on for hearing.

Mr. *Pemberton* and Mr. *Rogers* asked for the usual decree for an account.

Mr. *Kindersley* and Mr. *Sidebottom*, contra :—This bill calls for
 [*311] an account under a trust deed executed thirty-four *years ago, twenty-four years after the death of the *cestui que trust*, twenty-two years after the death of the trustee, and twelve years after the bill filed and apparently abandoned. Although there is no statutable bar, yet, after the extreme

[1] As to substituted legatee, see further *Le Jeune v. Le Jeune*, 2 Keen, 701, 703, n. 1. *Hustler v. Tillbrook*, 9 Sim. 368, 371, n. 1. *Wordsworth v. Wood*, ante, 25. *Gray v. Gorman*, 2 Harv. 268. 1 Russ. & M. 644, n. 1.

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degree of laches,—the want of the commonest diligence in prosecuting the suit, no decree ought now to be made. The court never assists a party who does not show reasonable diligence in bringing forward his claim; *Hercy v. Dinwoody*.^(a) In *Wood v. Briant*,^(b) the court refused an account against an administrator, *durante minore ætate*, after the expiration of twenty years from the testatrix's death. At this distance of time it must be assumed that nothing is due. If, however, a decree should be made, then in analogy to the action for *mesne* profits, the court will not give an account of rents and profits for more than six years: *Reade v. Reade*.^(c)

Mr. *Pemberton*, in reply:—Time is no bar in this suit. Lord Ossory, a trustee, by his solicitors, acted ten years under the deed:—The only laches to be attributed to the plaintiff are the eleven years which occurred between Lord Warwick's death and filing this bill; this is not sufficient to deprive him of his right to have an account which has never been delivered or settled.

THE MASTER OF THE ROLLS:—This bill was filed in August, 1828, and prays simply an account of all sums of money received on account of the rents of the estates comprised in the deed, and of the application of those moneys,—the commonest sort of bill that could well be; and the plaintiff who represents the Earl of Warwick, the party entitled to the "sur- [*312] plus of the moneys after the performance of the other trusts, would be clearly entitled to the account; but it is said, there ought to be no account granted by reason of the laches of the plaintiff, and the length of time which has elapsed. The Earl of Warwick died in the year 1816: it is said he never made any complaint; the probability, therefore, is, that he duly received the allowance of 1000*l.* a year, but it is not even stated that any account was ever rendered to him or to his executors. Has it ever been held that the mere delay in making a demand for the twelve years from the expiration of the trust, or ten years after the death of the trustee, the accounting party, where no account has been rendered, and therefore no presumption of acquiescence exists, of itself constitutes a bar to a trust account? No such case has been cited, and I think no such case has ever occurred. The suit being instituted in 1828, was not prosecuted nor set down for hearing till the month of January, 1839. I certainly think there have been very great laches on both sides, very great laches in the plaintiff in not prosecuting this cause to a hearing and very great laches on the part of the defendants, in not procuring the bill to be dismissed. The cause, however, during the whole of that time has been in court, and I must therefore look at the matter as I should at the moment when the bill was filed, and regarding it in that light, I do not think that the plaintiff is barred from having an account. I ought to direct that the Master be at liberty to state special circumstances with a view of furnishing the ground, which possibly may be thereby afforded, of presuming the discharge of many of these matters.[1]

(a) 2 Ves. jun. 87.

(b) 2 Atk. 521.

(c) 5 Ves. 744.

[1] Vide 3 Myl. & Cr. 44, n. 1. 2 Keen, 749, n. 1, 750, n. 1. *McKnight v. Taylor*, 1 Howard, 161. *Bertine v. Varian*, 1 Edw. Ch. Rep. 346.

1840.—The Attorney General v. The Ironmongers Company.

[*313] *ATTORNEY GENERAL v. THE IRONMONGERS' COMPANY.
BETTON'S CHARITY.)

1840 : February 12, 13, 14.

Bequest of residue to a company, to apply the interest of a moiety "unto the redemption of British slaves in Turkey or Barbary," one-fourth to charity schools in London and its suburbs; and in consideration of the care and pains of the company, the remaining one-fourth towards necessitated decayed freemen of the company. There were no such British slaves to redeem, and a reference was made to the Master to approve of a scheme for the application of the fund thus unapplied, having regard to all the charitable bequests in the will: Held, that the application of the fund to the education of the British emancipated apprenticed negroes was not a *cy-pres* application; secondly, that the gift to the freemen of the company was a charitable bequest; and thirdly, there being no direct objects to which the income could be applied, regard being had to the bequest touching British captives, that the application of the fund to the second and third purposes was as near as could be to the intention of the testator, having regard to all the charitable bequests in the will.

Principles on which the court proceeds in the application of a charity fund *cy-pres*.

In an information by the Attorney General at the instance of a relator, the Attorney General ought not to appear otherwise than in support of the information.

As to the position of the Attorney General in informations at the instance of a relator, and the practice in such cases.

THE will of Thomas Betton, dated the 15th of February, 1723, contained the following residuary clause:—"I give and bequeath the rest and residue of my estate wheresoever and whatsoever to the Worshipful Company or Corporation of Ironmongers of the City of London, and to their successors, making them my executors upon this special trust and confidence in them, reposed, that is to say, that they do with all convenient speed that may be after my decease, place my estate out at interest upon good securities, *positively forbidding them to diminish the capital sum by giving away any part thereof, or that the interest and profit arising be applied to any other use or uses than hereafter mentioned, and directed, viz., that they do pay one full half part of the said interest and profit of my whole estate, yearly and every year for ever unto the redemption of British Slaves in Turkey or*

Barbary; one full fourth part of the said interest and profit yearly [*314] and every year for ever unto *charity schools in the city and suburbs of London where the education is according to the Church of England, in which number that in this parish to be always included, and not giving to any one above 20*l.* a year; and in consideration of the said Ironmongers' Company's care and pains in the execution of this my will, the other fourth part of the said interest and profit yearly and every year for ever to the uses following: viz. 10*l.* a year to such minister of the Church of England, as they shall from time to time entertain in their aforesaid hospital for performing divine service and other duties belonging to that holy order; the remains unto necessitated decayed freemen of the said company, their widows and children, not exceeding 10*l.* a year to any family, but first deducting and paying quarterly out of this last-named fourth part of the interest and profit

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100*l.* a year in discharge of the annuity given to my kinswoman, Mrs. Eleanor Smith, during her natural life, and also always reserving sufficient for keeping my tomb in good repair."

For want of objects to whom to apply the moiety of the income of the testator's estate which he directed to be applied to the redemption of British slaves in Turkey or Barbary, a large fund, exceeding 100,000*l.* 3 per cents, had accumulated; besides this, the moiety of the annual income of the estates amounted to nearly 1000*l.* a year.

In 1829 this information was filed, for the purpose of having the fund applied to charitable purposes under the direction of the court.

In 1830 a decree was made, referring it to the Master to inquire if the income of the charity fund could be applied to the use contained in the will, and if not he *was to consider what was the most proper appli- [*315] cation of the income of the moiety of the estates and of the accumulations, and to approve of a scheme accordingly, and he was to take the accounts.

The Master reported that it could not be applied to the use contained in the will, there being no British subject held in slavery in Turkey or Barbary, and he approved of a scheme proposed by the Ironmongers Company, the effect of which was to appropriate the income towards the two other charitable purposes mentioned in the testator's will.

When the cause came on before Sir John Leach in 1833, he declared, "that the court had no jurisdiction to apply the surplus income of the moiety of the charity property in question in this cause and the accumulations thereof to any purpose inconsistent with the intentions of the said testator expressed as to the application of that moiety unto the redemption of British slaves in Turkey and Barbary; and he referred it back to the Master to settle and approve of a proper scheme to be submitted to Parliament for the application of the residue of the income of the said moiety, and the surplus of the accumulations thereof, and of the income of such surplus and accumulations."

Lord Brougham, L. C., however, on appeal, reversed this decision, and declared, "That the court had jurisdiction to apply the surplus income of the moiety of the charity property in question in this cause, and the accumulations thereof, as near as might be to the intention of the testator, having regard to the said bequest touching British captives, and also to the other charitable bequests in the said will;" and he remitted the cause to *be re-heard by the Master of the Rolls, on further directions on the [*316] Master's report, on the footing of the declaration thereby made.(a)

The case then came before Sir C. C. Pepys, M. R., on the 20th of April, 1835, when some embarrassment was felt by all parties, and by the court, from the situation in which the cause had been left by the several orders, &c., made in it; and on the 1st of May, 1835, his Honor ordered, "That it be referred back to the Master to review his report of the 20th of July, 1833, as to the scheme thereby approved of for the application of the said surplus

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moiety of the charity property, and the accumulations thereof, and of the dividends and income thereof, having regard as near as might be to the intention of the said testator as to the bequest contained in his will touching British captives, and having regard also to the other charitable bequests in the said will."

The matter being thus remitted to the Master, the relator brought in a scheme proposing the distribution of the income of the fund amongst seventy charitable institutions of every description.

The scheme of the Ironmongers Company, as before, proposed its application to the two other charitable purposes mentioned in the testator's will; and a third scheme was proposed by the trustees of Lady Mico's charity for its application to the education of the apprenticed negroes and their issue. and for preparing teachers; and they founded their claim principally on the ground that a similar application had been sanctioned by the court in the [*317] case of *The Attorney General v. Gibson*,^(a) of funds originally destined to the redemption of slaves.

(a) ATTORNEY GENERAL V. GIBSON.

Lady Mico, by her will, dated in 1670, gave and bequeathed the moiety of a sum of 2000*l.* to redeem poor slaves, which she directed should be put out as her executors thought best for a yearly revenue to redeem some yearly.

In 1680, an information was exhibited by the Attorney General against Robinson and others, the executors of the testatrix, for the establishment of the charity; and by a decree, made in June, 1686, it was ordered that the 1000*l.* should be laid out in the purchase of land, and the rents should be applied according to the directions of the will. The money was laid out, but the only part ever applied was 1500*l.* South Sea Annuities, which in March, 1757, was paid to Sir Charles Wager for the redemption of poor captive slaves. In 1827, an information was filed against Gibson and others, the executors of Barker, a trustee of the fund; and by a decree dated the 7th of July, 1827, and an order of the 15th of November, 1827, varying it, it was referred to the Master to appoint new trustees, and to approve of a scheme for the application of the income of the charity property according to the will of the testatrix; or if he should find that the same could not be executed according to her will, then as near the intent of the will as could be, regard being had to the existing circumstances and to the amount of the fund.

There were accumulations of the charity fund, amounting to 115,510*l.* consols.

In January, 1834, the Master made his report, appointing Mr. Gibson, Dr. Lushington, Mr. Fowell Buxton and Mr. Barker trustees of the charity.

The Master by his general report, dated in July, 1835, after finding these facts, stated that the relators had laid before him a proposed scheme for applying the bank annuities, dividends and rents and profits to the enfranchisement of slaves in the British colonies who were too poor to purchase their own freedom; which application, in consequence of the act for the abolition of slavery, had become impracticable, but the relators conceived that it would be a proper application of the charity fund, and as near as might be to the intention of the testatrix, that the same should be applied in and towards the education of the apprentices in the British colonies lately emancipated by the said act and their issue; but in case the Master should be of opinion that the redemption of poor Christian slaves held in slavery in the states of Barbary was an application more immediately within the scope of the testatrix's meaning, then the relators stated circumstances to show that no such application had been for a length of time practicable; and the Master found, that in an interview between Mr. Fowell Buxton and the Colonial Secretary, the latter stated that the plans of government for the education of the apprentices and their issue were nearly matured, and proposed that the said charity funds should be applied by the trustees for a similar purpose; and that the relators and trustees had proposed a scheme which he had considered, and was of opinion that the testatrix

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"The Master, by his report made in 1839, amongst other things, [*318] found "that there were no direct objects to which the said surplus money, and the accumulations thereof, and the dividends and income thereof, could be applied;" and it having been argued before him that he was, in the first instance, bound to have regard to the bequest in the will touching British *captives alone; and on the other hand, it having been [*319] argued before him that he was bound to consider of the application of the fund, having regard to all the charitable bequests in the will, he found that if the true construction of the said order of the 1st day of May, 1835, were that he was bound, in the first instance, to consider the application of the surplus moiety, and the accumulations thereof, and the dividends and income thereof, *in reference only* to the intention of the said testator *as to the bequest* contained in his will *touching British captives*, and if the case of *The Attorney General v. Gibson* cited before him were a case which should appear to this honorable court as applicable to this case, that the application proposed by the scheme brought in by the trustees of the Mico charity was an application, as near as might be, to the intention of the testator as to the bequest contained in his will touching British captives, provision being first made for a certain class of persons present at the battle of Algiers, and their families; but if the case of *The Attorney General v. Gibson* should not appear to this honorable court as applicable to the present case, or one that ought to govern it, or if the true construction of the said order of the 1st of May, 1835, were as secondly contended for, "whether the case of *The Attorney General v. Gibson* should or not appear to this honorable court as applicable to the present case, or one that ought to govern it, then he found," subject to the said provision for the persons present at the battle of Algiers, and their families, that the proper application of the said surplus moiety, and the accumulations thereof, and the dividends and income thereof, would be for the better support of the charity schools in the city and suburbs of London where the education was according to the Church of England, including therein the school of the parish where the testator dwelt and the Royal

by her will contemplated the redemption of poor slaves in the Barbary states, but he was of opinion that such intention could not be carried into effect. And he was of opinion that the proposed scheme was as near to the intention of the testatrix as circumstances would admit, and that the same was a proper scheme, and he approved thereof.

The scheme in effect was as follows:—That the fund should be transferred to the trustees and placed under the management of them and three other trustees to be appointed by the Colonial Secretary; that so much of the capital and dividends as the trustees should think fit should be applied in purchasing and building school houses for the education of the apprentices and their issue, and in qualifying teachers, and in paying the salaries of masters and other expenses; that the surplus rents might be applied towards the support of any other schools than such as aforesaid, and generally in promoting education in the British colonies; and it provided for the appointment of new trustees, for making the regulations for the management of the schools, and for an application for an act of parliament, if necessary, to sanction this application.

On the 29th of July, 1835, the cause came on for further directions before Sir C. C. Pypys, when this scheme was approved of, and the necessary consequential directions given

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[*320] Naval School *attached to Greenwich Hospital. And he found that, save as aforesaid, there were no objects to which the said surplus moiety, and the accumulations thereof, and the dividends and income thereof could be applied, having regard to the directions contained in the said order or decree of the 1st day of May, 1835.

The defendants, the Ironmongers Company, filed exceptions to this report, and the trustees of the Mico charity presented a petition praying the adoption of their scheme, and a transfer to them of the fund. The relator also presented a petition, praying generally that the court would take the Master's report into consideration, and make such order as might be necessary and proper.

Sir *William Follett*, Mr. *Kindersley* and Mr. *S. Sharpe*, for the Ironmongers Company, now contended that where property is devoted to several charitable purposes, and the direct objects of one wholly failed, it was the practice of the court to have regard to the remaining objects, and not to seek for objects analogous to the first. Thus, in *Mills v. Farmer*,^(a) a testator directed his residue to be divided, for promoting the Gospel, and bringing up ministers, and other charitable purposes he intended to name, and he died without naming any other purpose, the court then directed a scheme "*having regard particularly to the other two objects named.*"

So, in *The Attorney General v. Dixie*,^(b) a charitable fund being more than sufficient for the purposes intended, a scheme was directed for the application of the surplus, "*having regard to the testator's will.*"

[*321] . *But that the strongest case was *The Attorney General v. The Bishop of Llandaff*, stated by Lord Brougham,^(c) where property was given to endow two scholarships, and the residue to redeem British captives; and it being found, as in this case, that there were none to redeem, the fund was applied in the increase of the number and income of the scholars.

That if it was necessary, in the first instance, to seek an object analogous to the redemption of British slaves in Turkey or Barbary, then it was admitted that none such existed except the Mico charity, which in reality was not in any sense analogous. The intention of the testator was to redeem "British slaves" or natives of Great Britain taken by corsairs and illegally detained in slavery in Turkey or Barbary, and not negroes legally slaves. That the redemption of negroes in the West Indies would not be analogous to the redemption of British slaves in Turkey or Barbary, that the education of persons no longer slaves would be an application wholly dissimilar; and that if the fund was to be applied in education, it ought surely to be applied within the limits, and to the class, pointed out by the testator himself.

That *The Attorney General v. Gibson*,^(d) was no authority, being an amicable suit, in which persons remarkable for their zeal for the amelioration

(a) 19 Ves. 482.

(b) 2 Myl. & K. 342.

(c) 2 Myl. & K. 586.

(d) Ante, p. 317.

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of the negro population had first procured their appointment as trustees, and then concurred together in the application of the fund towards the favorite object of their benevolence, without regard to the intentions of Lady Mico, the testatrix; besides which, the terms of the bequest *were different, and authorities in such cases were not binding, for the court was not bound because in one instance it devoted a charitable fund in a particular way to follow that precedent in all subsequent occasions. [*322]

Mr. *Pemberton* and Mr. *O. Anderdon*, for the Attorney General, did not support the scheme of the relator; but they contended that the gift to the company was for their pains, and was not such a charitable object as would enable them to partake in the surplus fund.

The Attorney General, Mr. *Bethell* and Mr. *Rolt*, for the trustees of Lady Mico's charity, contended that a purpose analogous to the first was in the first instance, to be looked for without regarding the other charitable purposes mentioned in the will. That if there were no British slaves in Turkey or Barbary it would be a proper application of the fund to redeem slaves elsewhere, and that the redemption of British slaves in the West Indies would be *cy-pres* to the charitable object of the testator; that as no such slaves now existed, the next best application would be in the moral improvement of the apprenticed negroes, according to the plan adopted in the case of Lady Mico's charity; and that this was the only *cy-pres* application of the fund.

That the decision in *The Attorney General v. Gibson* was binding, and ought to be followed in the present case; that the persons present at the battle of Algiers and their families ought not to participate in this charity; and that the Ironmongers Company could only be entitled to their due proportion, viz. one-fourth, for their trouble.

*They cited *The Attorney General v. Bowyer*, (a) *Moggridge v. Thackwell*, (b) *Hayter v. Trego*, (c) *The Attorney General v. Wansay*, (d) *The Attorney General v. City of London*. (e) [*323]

Mr. *Turner*, Mr. *Chandless* and Mr. *Hubback*, for other claimants not parties to the cause.

Mr. *Wray* for the Attorney General.

Sir *W. Follett*, in reply.

THE MASTER OF THE ROLLS:—It is very unfortunate that this matter has been brought forward on a report so vague in its terms as to render it very difficult to reduce the case neatly to the points which require decision. The two-fourth parts of the income of the property have been duly applied according to the will of the testator from the time of his death, but there being no objects to whom to apply the other moiety intended for the redemption of British slaves in Turkey or Barbary, the consequence has been that the Ironmongers Company, like faithful trustees, have preserved and accumulated the fund, which now amounts to a very large sum. The ostensible object of this information is to have that accumulated fund administered un-

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der the direction of the court. The case came before Sir John Leach and Lord Brougham in the manner which has been stated.

When that matter came on again at the Rolls, in rather a singular [*324] course of proceeding, the present Lord *Chancellor, the then Master of the Rolls, did all that could be done on that occasion ; he had no jurisdiction or authority to alter the nature of the order, or to make it more distinct than it was, and he referred the matter to the Master in the terms of Lord Brougham's declaration, with a slight verbal alteration, which was probably accidental, and scarcely requires any observation. When this matter subsequently came before the Master he seems to have been very much perplexed by the conflicting claims ; it was contended on the one hand, that he ought first of all to inquire exclusively whether there was any purpose *cy-pres* to the first, and if he could by possibility find one, he was to have no regard to the other two purposes in the will ; on the other hand, it seems to have been contended before him, that he ought to attend to the second and third purposes in the will first, they being clear and the first being obscure ; between these the Master seems to have found it impossible to come to a decision, the fact being, as I consider, that the truth was between both.

With respect to the order of reference, it is now necessary that some construction should be given to it, and I am of opinion that the Master was bound to consider whether there could be a *cy-pres* application for the first purpose, before he proceeded to consider the propriety of the application to the second purpose. But then I am by no means of opinion that he was bound to consider it precisely in the same manner, as he would have been bound to do if there had been no other charitable purpose mentioned in the will. Where a fund is to be disposed of *cy-pres*, the court, for the sake of making a disposition, is bound to act upon the suggestions which are before it, however remote, and it is rather astute in ascertaining some application

[*325] in conformity more or less with the *intention of the testator. The case, however, is different where there are other charitable purposes mentioned in the testator's will itself, and in which a comparison may be instituted between the probability of the testator resorting to something very remote from his original intention, and something far less remote from the other objects which are specifically mentioned in the will. I quite agree with the view which has been taken upon the subject in the argument,—that if it could have been found that there was a clear and close approximation to any purpose analogous to the first, that the Master ought to have preferred it to the second and third, distinctly mentioned in the will ; but if such approximation were so remote that there would be very great difficulty in making out the similarity, and it appeared probable that if the subject had been in the contemplation of the testator he would have preferred the other two objects mentioned in the will, then I think it became the duty of the Master to look to those second objects and lay aside the first.[1] Taking that view of the

[1] " It is obviously true that if several charities be named in a will, and one failed for want of objects, one of the others may be found to be *cy-pres* to that which has failed ; and, if so, its being

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matter, then comes the question with regard to the Mico trust. The claims of the Mico charity have been put forward with a degree of eloquence and feeling which excites a strong disposition to comply with what is asked, if it could be done consistent with that duty which is imposed upon a court of justice. By a series of steps proceeding upon one another, it has been attempted to be made out that there is an analogy at least, between the objects of the Mico charity, according to its present constitution, and the objects which were in the view of this testator, having regard to all the other purposes mentioned in the will, all of which are distinctly referred to in the order of reference, and to which I am bound to attend on the present occasion. Independently of any authority, however, I confess it would be impossible for me to come to a conclusion that an *application of these funds to the Mico charity [*326] would be an application *cy-pres* to the testator's intentions in the present case. The authority which is cited in support of the claims of the Mico charity is the case of *The Attorney General v. Gibson*, referred to also in the Master's report. Now I am so perfectly aware of the intention which the present Lord Chancellor has always given to cases of this nature when brought before him, that I cannot doubt but the case cited received his very serious attention, so that if the two cases had been in all respects similar, I should have so far distrusted my own judgment, as to have found it very difficult to have come to a conclusion differing from his; not that I think authorities in such cases are or ought to be considered as binding; they merely furnish lights and afford examples which may may be useful to a certain extent in subsequent cases; but in every case of a scheme *cy-pres*, the court, having obtained the best information it can, is bound to act upon the particular lights then before it: and to say that it is bound to pursue precisely the same course when it has other and better lights before it on a subsequent occasion, is a proposition too extravagant to be maintained. The Mico charity, having regard to the will, was extremely different from this; for there the purpose of the testatrix, so far as that purpose appeared in any of the proceedings, was a single purpose for the benefit of slaves; here it is not. Sir John Leach in this case thought the purposes entirely distinct, and that they ought to be considered without reference to one another; that opinion was overruled, and I am now at least bound to consider the purposes conjointly; and it follows then, as of course, that the circumstances under which the Mico case was brought forward were entirely different from those of the present; I am, therefore, of opinion that the scheme of the Mico trustees cannot be considered as a *cy-pres* application of these funds.

*Two other schemes have been also brought forward, namely, the [*327] scheme of the relator, and the scheme of the Ironmongers Company. I have read through the scheme of the relator, and do not consider it to be a

approved by the testator ought to be an additional recommendation, but such other charity ought not, as I conceive, to be preferred to some other more nearly resembling that which has failed." Lord Cottingham, in this case, upon appeal. Cf. & Ph. 222.

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proper application of these funds. Upon the best consideration which I have been able to give to the suggestions which have been made at the bar, not by, but on behalf of the Attorney General, it does not appear to me that I can secure a *cy-pres* application in that manner; and under all these circumstances, I think I am bound to consider that the Master having, as I assume, on the present occasion, ascertained that no application can be found *cy-pres* to the first charitable purpose, ought to have proceeded to do that which was next.[1]

The only remaining question is, whether the scheme of the defendants, the Ironmongers Company, ought either to be adopted or be put in a further course of investigation. With regard to this, one question has been raised, that is, whether the last gift "unto the necessitated decayed freemen of the said company, their widows and children, not exceeding 10*l.* a year to any family," in consideration of the company's care and pains in the execution of the testator's will, is a charitable gift entitled to receive benefit from the surplus. It has been argued that it is to be considered in the nature of a remuneration or wages for the trouble imposed upon the company; but I am not of that opinion; it appears to me that this is not the less a charity because the testator has expressed a peculiar motive for directing his bounty to flow in that particular direction; he was imposing trouble upon the company, and it also seems, by other parts of the will, that he was closely connected with it, and had other motives for directing his bounty to flow thither. I am, therefore, of opinion that the third purpose must be considered as a charitable [328] purpose, and that the "principle of the defendants' scheme is a proper one for the Master to act upon. As to the details of the scheme I am entirely ignorant of them, for I do not find, from the Master's report, that he has settled, approved, or even examined them.

It appears, therefore, that the result must be a reference back to the Master to inquire into the scheme proposed by the company.(a)

Another point occurred in this case.

The *Attorney General* attended as counsel for the Mico charity, and

Mr. *Pemberton*, on opening the case, stated he appeared as counsel for the relator.

THE MASTER OF THE ROLLS said that he did not recognize the relator as distinct from the Attorney General; that the suit was the suit of the Attorney General, though at the relation of another person upon whom he relied and

(a) *Extract from Order*:—Declared that there are no direct objects, regard being had to the bequest touching British captives.

Declare the scheme of the defendants, so far as it proposed the appropriation of the income to charity schools in the city and suburbs of London where the education is according to the Church of England, and to the necessitated decayed freemen of the Ironmongers Company, their widows and children, was a proper scheme.

Refer it back to the Master, to review his report, and approve of a scheme accordingly.

[1] Vide *Bennett v. Hayter*, ante 81.

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who was answerable for costs; and that he could only recognize the counsel for the relator as the counsel for the Attorney General, and could hear them only by his permission; that the suit was so entirely under the "control of the Attorney General that he might desire the court to [*329] dismiss the information, and that if he stated that he did not sanction any proceeding, it would be instantly stopped.

Mr. *Pemberton* then proceeded for the informant, and

The *Attorney General* personally attended as counsel for the trustees of Lady Mico's charity.

On the following day, on coming into court,

THE MASTER OF THE ROLLS said, I wish to make a remark upon the position in which Mr. Attorney General stands in this case, and I regret that I omitted to do so yesterday. I then, however, very clearly stated my opinion, that a proceeding upon an information of this kind was a proceeding of the Attorney General; and that he had the entire control and management of it throughout. I believe I ought to have gone on to say that the Attorney General ought not to be allowed to appear for any other party than the informant. I had some recollection that the point had occurred before; but I could not distinctly recollect where it was to be found; I have, however, since found it referred to in a note to *The Attorney General v. The Mayor &c. of Galway*,^(a) where a petition of re-hearing was entitled as the petition of the relators in the suit, upon which Sir A. Hart remarked that it was not a proper form, and said "that it should be the petition of the Attorney General, for the relator is not looked upon as a party. If he dies the suit does not abate, and his intervention is only in respect of costs. The Attorney *General is the party, and the petition of appeal should be the petition [*330] of the Attorney General, at the relation of the relators." Sir A. Hart there states, "that Lord Eldon had often said, that in an information at the suit of the Attorney General that officer ought to be of counsel with the relators." That "the point arose when Lord Gifford was Attorney General, in the *Attorney General v. The Mayor of Bristol*. He was Recorder of Bristol, yet Lord Eldon laid it down that he should be counsel for the information and not for the defendants."

In former times, briefs in these cases were delivered to the Attorney General, and he was in the habit of personally appearing upon them. Many cases have recently occurred in which there has been great reason to regret the want of his appearance. He did not always appear when briefs were delivered; the expense of delivering them was thought a grievance, the practice has been altered, and the relators have too often considered themselves entitled to conduct the suit in their own manner.

But still the suit is the suit of the Attorney General, and if he should desire the information to be dismissed, the Court must dismiss it accordingly,

(a) 1 Molloy, 97.

1840:—The Attorney General v. The Ironmongers Company.

and it is for him, in the exercise of his public duty, to determine whether he will proceed at all, and if so, in what manner. He is, therefore, placed in a singularly inconvenient, if not in an incompatible position, when he appears on behalf of a defendant to oppose the information. In my opinion this inconvenience ought to be avoided, and the mind of the Attorney General ought to be free from every thing which can tend or appear to tend to bias the judgment with which, in the discharge of his public duty, he is to direct the conduct of these informations. And this opinion is the result of a very [*331] great number of years' experience, in which I have seen the great mischief which has arisen in consequence of the Attorney General not being present. The sort of projects which have been proposed in his name, under the sanction of his high official authority, would surpass belief. Schemes which have been proposed in charity cases have been sometimes of the most extravagant nature; the discussion has led to enormous expense, which the charities have been loaded with. In order to prevent, in some degree, that abuse, which arose from the deviation from the old practice, which, even in my remembrance, was that the Attorney General should always attend before the Master by counsel upon the consideration of a scheme, Sir John Leach directed that counsel for the Attorney General should always attend, not as a distinct party, but to prevent the persons who were there retained by the relators having the sole control of the promotion of a scheme, that is, the counsel for the Attorney General was to attend there to control the counsel who were retained by the relators, and in order that that important public officer might be present at the proceedings and protect not only the charity but the public.

If I could do what I think right, I would take care that the Attorney General personally, or some gentleman retained under his direction, should be present upon every charity proceeding, because without that vigilance and sanction which he in that way could bestow, there is no protection for charities or the public.

In this particular case, as the matter has proceeded so far, and as any change would be productive of considerable expense, it appears to me better to go on with the present arrangement: upon any future occasion I hope that a different arrangement will be made.

[*332] *The Attorney General observed, that it had been the practice for the Attorney General to appear by his counsel separately from the counsel of the relators. That he had personally appeared in the House of Lords in the case of Lady Hewley's charity in opposition to the information, when the House intimated a clear opinion that it was regular. That he was anxious to have it understood that the Attorney General did not give his sanction to the scheme of the relators, though it was his wish that the court should hear every thing and then decide.

THE MASTER OF THE ROLLS remarked that he did not know any thing more important to the general interests of charities and of the public, so far as

1839 —Pearce v. Verbeke.

it was interested in charities, than that the authority and discretion of the Attorney General in all these proceedings should be maintained perfectly unbroken, unfettered, and unbiassed.(a)[1]

*PEARCE v. VERBEKE.

[*333]

1840 : February 14.

On the 6th of June, upon a contemplated marriage, the lady's father proposed during his life to allow his daughter 200*l.* a year, to continue if she died in her father's life leaving children ; but if she died in his lifetime without issue, then 100*l.* to the husband during the father's life. The father, in a letter to his solicitor, also stated that he wished the husband to have 150*l.* a year in the event of his daughter's death without issue ; the proposal was agreed to, and a settlement prepared and executed, dated the 8th of July, whereby the father covenanted, during his life, to pay an annuity of 200*l.* to the husband and his assigns. The husband died insolvent, leaving his wife and three children. After his death, the settlement was rectified upon the production of the proposals, and the evidence of the solicitor who prepared the settlement, that he had prepared the settlement from the proposals which he thought he had carried into execution ; and the wife was declared entitled to the annuity as against the husband's representatives.

THE object of this suit was to have a marriage settlement rectified according to the alleged terms of the original proposals for a settlement, and to have the rights of the parties as to part of the property comprised therein declared.

Previous to the marriage of Mr. Verbeke with Miss Pearce, the daughter of the plaintiff, a negotiation was entered into for the settlement of her property, which was reversionary and expectant on the death of her parents. The parties being desirous to have this property settled, and the plaintiff being willing to make them a present provision, proposals for a settlement were in June, 1831, drawn out by Mr. H., the solicitor of the plaintiff, which, after providing for the settlement of her reversionary property so as to divide the income between Mr. Verbeke and his intended wife, and to give the whole income to the survivor, with remainder to the children of the marriage, contained the following passage:—"Mr. Pearce proposes to allow his daughter 200*l.* a year during his life, and if she dies in his lifetime leaving children, to be continued during his life ; but if she should die in his lifetime without leaving issue, then the payment to cease with her demise."

*On the 6th of June, 1831, a copy of these proposals was sent to the plaintiff for his perusal and approval. The plaintiff altered the same by striking out the last six words and by inserting in the place of them the

[*334]

(a) Appeals were presented by the Attorney General and the trustees of the Mico charity ; the Lord Chancellor, however, held that the latter, not being parties to the suit, were not entitled to be heard. His Lordship on the 23d of January, 1841, rejected all the schemes, and held that the released fund ought to be applied in support of charity schools in England, without any restriction as to place, where the education was according to the Church of England, but not giving to any one more than 20*l.* a year. [The case upon appeal is reported, Cr. & Ph. 208.]

[1] On the hearing of the appeal, in this case, "the Lord Chancellor said, that, on an information, the Attorney General was the party prosecuting the cause, and was the only party whom the court could recognize in that character ; and therefore that his Lordship could not hear the Attorney General against the relator, or the relator against the Attorney General." Cr. & Ph. 218.

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following words : viz. " Yearly allowance during the term of Mr. Pearce's life to be 100*l.* per annum to Mr. Verbeke."

On the 8th of June, 1831, the plaintiff returned the written proposals to his solicitor with the above alteration therein, and accompanied by a letter from the plaintiff, stating that Mr. Verbeke had seen the proposal and had approved of them, and further stating as follows :—" I wish to let him possess 150*l.* per annum in the event of my daughter dying without any issue of the marriage, which condition you will be good enough to include in the bond."

A draft of a settlement was prepared which was afterwards executed and bore date the 8th of July. It recited " that it was upon the treaty for the said intended marriage agreed on the part of the said William Pearce, in order to make some immediate provision for the said Henry Charles Verbeke and Emily Pearce his intended wife, during the life of the aforesaid William Pearce, in case the said intended marriage should take effect, that he the said *William Pearce should pay unto the said Henry Charles Verbeke* or his assigns during the life of him the said William Pearce, the clear annual sum of 200*l.*; but that in case the said Emily Pearce should happen to die in the lifetime of the said Henry Charles Verbeke, her intended husband, without leaving any issue of the said intended marriage living at the time of her death, then the said annual sum of 200*l.* should cease, and that in lieu of the said annual sum of 200*l.* the said William Pearce should during his life [*335] pay *unto the said Henry Charles Verbeke or his assigns the clear annual sum of 100*l.*" The settlement then contained a covenant on the part of Mr. Pearce, the plaintiff, in case the intended marriage took effect *to pay unto the said Henry Charles Verbeke, his executors, administrators, and assigns, during Mr. Pearce's life, an annuity of 200*l.* a year* : " provided always, nevertheless, that in case the said Emily Pearce should happen to die in the lifetime of the said Henry Charles Verbeke, her intended husband, without leaving issue of the said intended marriage living at her death, then the said annual sum of 200*l.* should cease, and that then he the said William Pearce would yearly during his, William Pearce's, life pay unto the said Henry Charles Verbeke, his executors, administrators and assigns, in lieu of the aforesaid annual sum of 200*l.* one annual sum of 100*l.*"

The settlement contained a proviso, that if Mr. Verbeke should charge or incur the annuities or become bankrupt, or take the benefit of the insolvent debtors' act, or be in any manner deprived of the right to receive and enjoy the said annual sums or either of them by operation or process of law, the annuities of 200*l.* and 100*l.* should cease.

The marriage took effect, and in September, 1837, Mr. Verbeke died insolvent leaving his widow and three children surviving him. The subsequent payments of the annuity of 200*l.* were thereupon claimed by the defendant, his administrator, as part of his assets.

The plaintiff, Mr. Pearce, then filed this bill, contending that the 200*l.* was always intended and considered by him and Mr. Verbeke to be for the

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benefit of his daughter and her family, and that according to the *writ- [*336]
ten proposals, it was to have been secured and paid to Mrs. and not
Mr. Verbeke.

The only witness examined to prove the case was Mr. H., the solicitor of the plaintiff, and who had been engaged in preparing the proposals and settlement. He proved the preparation by him of the proposals and the alteration, and that he had prepared the draft of the settlement "from or pursuant to the proposals, and that such draft did not, to the best of his recollection and belief, differ from such proposals in any particular; that he and Mr. Verbeke had perused, approved and settled it; "that at the meeting between him and Mr. Verbeke to settle the draft of the said settlement, frequent reference or allusion was made in the course of it, as well by Mr. Verbeke as by himself, to the said terms or proposals for a marriage settlement, and particularly to that part thereof which related to the allowance to be made by the plaintiff; and that Mr. Verbeke, then informed deponent that he, Mr. Verbeke, had read over with the plaintiff the said proposals for a marriage settlement, and that he, Mr. Verbeke, assented to the terms and stipulations thereof, and that he and the plaintiff had agreed to the same; that the said conversation so had between Mr. Verbeke and the examinant, and the consent so given by Mr. Verbeke to the said proposals for a marriage settlement as aforesaid, had reference to that part of the said proposes which alluded to the allowance to the said Emily Pearce as the examinant well remembered, the said Mr. Verbeke remarking in the course of the said conversation that both himself and the said Mr. Pearce considered the allowance to be made by him the said Mr. Pearce to be for the benefit and support of the said Emily Pearce and her children, in the event of her surviving him, Mr. Verbeke."

*Mr. Pemberton and Mr. Harwood, for the plaintiff, cited *Barstow* [*337]
v. Kilvington,(a) *The Duke of Bedford v. The Marquis of Aber-*
corn,(b) *Jenkins v. Quinchant*.(c)

Mr. Treslove and Mr. Williams, for Mrs. Verbeke and her children, contended that it was evident from the written proposals that the object was to provide for the wife and children, which had not been effected through the mistake of the solicitor, and that the settlement ought now to be reformed so as to work out the real agreement and intention of the parties: they cited *Higginson v. Kelly*,(d) *Ex parte Verner*,(e) *Simpson v. Vaughan*,(g) *Beaumont v. Brainley*.(h)

Mr. Kindersley and Mr. Bichner did not dispute the jurisdiction, but insisted on the extreme danger of altering, upon parol testimony, a solemn instrument after the death of a party, and when circumstances had changed; that the deed itself was the ultimate arrangement between the parties, and if a difference existed between the settlement and the original proposals, it must

(a) 5 Ves. 593.

(b) 1 Myl. & Cr. 312.

(c) 3 Ves. 95, b. n.

(d) 1 Ball & B. 262.

(e) 1 Ball & B. 260.

(g) 2 Atk. 31.

(h) Turn. & R. 41.

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be assumed that the parties had changed their intention, and had acceded to a new arrangement^(a) during the month which had intervened between the proposal and the settlement.

THE MASTER OF THE ROLLS :—All cases of this description must necessarily be disposed of upon their own peculiar circumstances; but whenever, from those circumstances, the court can come to a satisfactory conclusion as to what was the intention of the parties, and it appears that such in [*338] tention has *not been carried into effect, it will exercise its jurisdiction for the purpose of correcting that which has been done in error.

In 1831, upon the treaty for the marriage, the property for the wife was so circumstanced as to render it impossible to provide an immediate maintenance for her; and her father, by the written proposal, agreed to allow his daughter 200*l.* a year during his life, to be continued if she died in his lifetime leaving children, but to cease if she died in his lifetime without children. This proposal had clearly a reference to the maintenance of the family which might arise. If there were no children to provide for, the annuity was to cease upon her death, although her husband might survive. This was the first proposal which was assented to by Mr. Verbeke.

Mr. Pearce afterwards made a variation in the proposal, he proposing to give Mr. Verbeke 100*l.* per annum in the event of his daughter dying without issue, and which he directs may be included in the bond. This of course was acceded to, and these two proposals at that time formed the agreement between the parties.

It is said that the agreement was afterwards varied, and the question is, whether that is really the case. Now it appears that these proposals were sent to the solicitor as instructions for the preparation of the settlement. He says that he prepared the draft pursuant to these proposals. The parties, entirely relying on him, afterwards executed the deed; and from the evidence I think it clear that the deed was intended to be, and ought to have been, in conformity with the proposals. The deed itself recites an intention to make some immediate provision for Mr. Verbeke and his wife; this recital clearly

shows that it was intended to make a present and immediate provision for Mrs. Verbeke. The covenant *by which this is attempted [*339] to be carried into effect is an absolute covenant to pay an annuity of 200*l.* to Mr. Verbeke and his assigns during the life of Mr. Pearce, thereby making the annuity his absolute property, and leaving the wife and children wholly unprovided for. The covenant then provides, that "if the wife should die in her husband's lifetime, without issue, then that the annuity should be reduced to 100*l.* a year, and that if Mr. Verbeke should become bankrupt, &c., the annuity should cease; but it does not, even in that event, provide in any way whatever for the wife and children. What has happened? Mr. Verbeke has died insolvent, leaving his wife and children surviving, and his executors, on the part of his creditors, claim to have the annuity of 200*l.* which

(a) See 3 Myl. & Cr. 740.

 1840—Townsend v. Westacott.

Mr. Pearce intended as a provision for the wife and children, paid to them ; so that the wife and children are, during the life of Mr. Pearce, to be left absolutely destitute ; and this, it is conceived, is a settlement in conformity with the proposals which were made and acceded to. I think it likely, that in preparing this settlement, it was assumed that Mr. Verbeke, when in the enjoyment of this annuity, would make for the wife and children that provision which was intended for them. I think that must have been the notion of the solicitor preparing the settlement, but it could never have been the intention of the parties that this annuity, strictly intended for the wife and children, should be so limited by this settlement as to give it to the creditors of the husband, leaving the wife and children entirely destitute. I think that the mode by which the intention was attempted to be carried into effect erroneous. The intention was, that in the event which has happened, the annuity of 200*l.* should be a present and immediate provision for the wife, and through the wife for the children ; I must therefore declare that this settlement must be reformed.

 *TOWNSEND V. WESTACOTT.

[*340]

1840 : February 20, 25.

A party largely indebted makes a voluntary settlement, and becomes insolvent within three years: Held sufficient to avoid the settlement under the 13 Eliz. c. 5 ; and held also, that in order to set it aside it was not necessary to prove that the settlor was in a state amounting to insolvency. A bill alleged that the settlor, at the time of making a voluntary settlement, was greatly indebted, it did not state the particulars of the debts, but referred to a schedule of the settlor in the Insolvent Court in aid of the suit: Held, that the existence of the debts was not sufficiently put in issue as against an infant, but an inquiry was directed on the point.

IN the year 1830, the defendant, John Westacott, was absolutely entitled, amongst other property, to five closes of freehold land, which stood limited to the usual uses to bar dower, and as to which there were outstanding terms vested in trustees to attend the inheritance.

On the 2d of April, 1830, Westacott appointed and released this property to a trustee, upon trust for himself for life, with remainder to Maria Pook, an infant, the daughter of his housekeeper Elizabeth Pook, absolutely, with a gift over to Elizabeth Pook in case of the death of Maria Pook before she attained twenty-one. This deed was purely voluntary, and was made without any consideration. No marriage was then in contemplation ; but sometime afterwards Westacott married Elizabeth Pook.

In October, 1832, Westacott was imprisoned for debt ; and on the 19th of January, 1833, he petitioned for relief under the insolvent debtors' act, and executed the usual conveyance to the provisional assignee. In March, 1833, his petition was heard, when he was remanded for nine months, at the end of which time he was discharged. The plaintiff, his assignee, to whom the usual conveyance had been made by the official assignee, filed this bill, stating, that in April, 1830, Westacott was in insolvent circumstances, and in-

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debted in upwards of 6500*l.*, which he was unable to pay ; that he [*341] had executed the deed with the intent to delay and defraud his creditors ; that he had continued insolvent and indebted down to the time of his imprisonment ; and it contained the following allegation :—" That the schedule of the debts of the said John Westacott, annexed to his said petition, and verified by his oath, contained debts due from him to the amount of 8194*l.*, of which sum debts to the amount of more than 5600*l.* appeared, by the said schedule, to have been, and in fact were due from the said John Westacott on the 2d of April, 1830, and plaintiff craves leave to refer to such schedule in aid of this suit, and intends to prove, if necessary, such existence as aforesaid of the said debts ;" the bill did not, however, specify any debts. It prayed that the deeds might be declared fraudulent and void and might be delivered up to be cancelled ; and for a conveyance to plaintiff as assignee, by the trustee of the deed ; for an assignment of the outstanding terms ; and if necessary, that the validity of the instruments might be tried by an action at law, and for that purpose that the outstanding terms might be removed.

The defendants, Westacott and wife, insisted that he was not insolvent at the time of the execution of the deed ; but that his property at that time would have produced 7000*l.* while his debts and liabilities did not exceed 5600*l.* ; the infant, Maria Pook, put in the common infant's answer.

The plaintiff proved the existence of debts on the 2d of April, 1830, of about 2256*l.*, due to creditors mentioned in the insolvent's schedule, including therein a debt due to the plaintiff on bond dated in 1829.

The defendant entered into evidence to prove the value of the property, but the evidence was considered very unsatisfactory by the court.

Mr. *Pemberton* and Mr. *Chandless* for the plaintiff, contended, [*342] that the settlement was fraudulent and void under the statute of 13 Eliz. c. 5, against creditors existing at the time, and that being set aside in regard to them, all subsequent creditors would be let in : they cited *Goodson v. Jones*, (a) *Russell v. Hammond*, (b) *Walker v. Burrows*, (c) *Taylor v. Jones*, (d) *Lord Townsend v. Windham*, (e) *Partridge v. Gopp*, (g) *Kidney v. Coussmaker*, (h) *Montague v. Lord Sandwich*, (i) *Richardson v. Smallwood*, (k) *Whittington v. Jennings*. (l)

Mr. *Richards* and Mr. *Elderton*, contra, objected that there was no allegation in the bill that the plaintiff was a creditor at the time of the execution of the settlement, or that he was a creditor at all. That the existence of the debts at the time had not been properly put in issue by the bill ; and that the reference to the schedule, which was binding alone on the husband, was not sufficient for that purpose ; that consequently the evidence of these debts could not be received as against the infant and the married woman.

They contended also that in order to set aside a voluntary settlement it

(a) *Styles*, 446.

(b) 1 Atk. 15.

(c) 1 Atk. 93.

(d) 2 Atk. 600.

(e) 2 Ves. sen. 10.

(g) *Ambler*, 596.

(h) 12 Ves. 155.

(i) 12 Ves. 155. note.

(k) *Jac.* 552.

(l) 6 Sim. 493.

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was requisite to prove that the settlor at the time was indebted to the extent of insolvency; *Lush v. Wilkinson*.(a)

Mr. *Jemmett*, for trustees.

Mr. *Chandless*, in reply, contended that the debts were properly put in issue by the reference to the schedule, and stated they had been so alleged to save the great *expense of setting out the debts in the bill; he argued [*343] that if there existed any doubt, then that the case ought to be put in a course of inquiry.

THE MASTER OF THE ROLLS :—This bill is filed by the assignee of Westacott, an insolvent debtor, against the insolvent, his wife and her infant daughter, and against the trustees of the settlement and of some outstanding terms of years. The object of the bill is to set aside for fraud a voluntary conveyance which was made by the insolvent on the 2d of April, 1830, to a trustee, for himself, for life, and afterwards in trust for Mrs. Pook and Maria Pook, her infant daughter. Mrs. Pook, being a stranger to the settlor, and no marriage being in contemplation at the time, though they afterwards married, this deed was a purely voluntary conveyance; and if it was a conveyance executed for fraudulent purposes it ought to be set aside; but if the transaction was honest, and without fraud, it ought not to be interfered with. In the first place, it is alleged on the part of the plaintiff, that this deed was executed entirely without consideration; that is admitted. In the next place it is said, that the settlor was largely indebted at the time; and of this there is strong evidence, which I shall presently notice. Being largely indebted he made this voluntary conveyance, and in less than three years afterwards he became absolutely insolvent. On these facts alone, provided they were properly put in issue and proved, I am of opinion that this conveyance ought to be set aside as fraudulent.

The state of the pleadings, however, is this, it is alleged by the bill that Westacott was, at the time, in insolvent circumstances, and indebted in a large amount to several persons, which he was unable to pay. The persons to whom he was so indebted are not specified; *but it is stated, [*344] in a subsequent part of the bill, that having become insolvent, his debts in his schedule appeared to be \$1841., of which \$600l. were due on the 2d of April, 1830; and the plaintiff then “craves leave to refer to such schedule in aid of the suit, and intends to prove, if necessary, such existence as aforesaid of the said debts.” With respect to Westacott himself, the schedule is a sufficient admission of the debts; but of the other defendants one is a married woman, and the other an infant, who has put in a common infant’s answer. These defendants have not had an opportunity of examining these debts. It would be very difficult to hold the infant or the married woman absolutely bound by the allegations as to the schedule, even for the purpose of putting them to prove that they are not to be affected by them; for every thing as regards an infant or a married woman must be taken strictly. I can

 1840.—*Townsend v. Westacott*.

have no doubt that the bill was put in this form with the very proper intention of saving expense; but this upright intention is sometimes defeated without the least fault of those who defend the case; and the advisers of the infant and married woman are quite right in seeing that these debts are strictly proved against them.

There has been a little exaggeration in the arguments on both sides as to the principle on which the court acts in such cases as these: on one side it has been assumed that the existence of any debts at the time of the execution of the deed would be such evidence of a fraudulent intention as to induce the court to set aside a voluntary conveyance, and oblige the court to do so under the statute of Elizabeth. I cannot think the real and just construction of the statute warrants that proposition, because there is scarcely any man who can avoid being indebted to some amount: he may intend to pay every [*345] debt as soon as it is contracted, and *constantly use his best endeavors, and have ample means to do so, and yet may be frequently, if not always, indebted in some small sum: there may be a withholding of claims, contrary to his intention, by which he is kept indebted in spite of himself; it would be idle to allege this as the least foundation for assuming fraud or any bad intention. On the other hand, it is said that something amounting to insolvency must be proved to set aside a voluntary conveyance: this too, is inconsistent with the principle of the act, and with the judgments of the most eminent Judges.[1] The evidence as to the value of Westacott's property when he executed the settlement I cannot rely on; it is brought forward many years after the witnesses had known it, and they speak to the value of the property without taking into consideration any charges that might be upon it; and I am not in a situation of knowing whether there were any charges upon it.

Under the circumstances in which this case has been brought before me, if the married woman and infant had had the opportunity of meeting the evidence as to the existence of the debts at the time of the settlement, I should have been bound to make the decree which is asked for in the first instance. I cannot, however, under the circumstances, make such a decree as is asked; but the plaintiff is, I think, entitled, under the alternative prayer of his bill, to try the validity of the settlement by an action at law; but if there are any difficulties which cannot be removed, I will direct a reference to the Master.

The case was subsequently mentioned, when it was referred to the Master to inquire what debts were owing by Westacott at the date of the deed, and at the time of his insolvency.

[1] Vide Jac. 558, n. 1, and cases there cited. *Hopkirk v. Randolph*, 2 Brockenbrough, 130. *Godell v. Taylor*, Wright's Ohio Rep. 82. *Van Wyck v. Seward*, 6 Paige, 62. *Bank of United States v. Houston*, id. 526.

1840.—Gaunt v. Taylor.

*GAUNT v. TAYLOR.

[*346]

1840 : February 24.

Where several persons are made defendants in respect of a joint fiduciary character only, or if any beneficial interest which they may have does not conflict with their duty, they ought not to sever in their defences, otherwise one set of costs only will be allowed them.

THE testator by his will had given his widow an income of 270*l.* out of his estate, and had appointed her, together with Shaw and Tottie, his executrix and executors and who proved his will. This was a creditor's bill filed against the executors, executrix, and the heir at law of the testator for the usual administration of his estate. The executrix and executors appeared jointly to the bill but the widow, having an interest in the estate different from that of her co-executors, severed in her defence, and throughout the subsequent proceedings appeared by a different solicitor. By orders made on former occasions, two sets of costs had been allowed them, and the cause now coming on for further directions, it appeared that the personal estate was insolvent, and that the testator was not a trader.

Mr. Kindersley, Mr. G. Richards and Mr. James Russell, for the plaintiff contended that the executors and executrix were to be allowed one set of costs only, as there was nothing to justify their separating in their defences.

Mr. Treslove and Mr. Parker, for the two executors, and

Mr. Pemberton and Mr. Elderton, for the widow, contended that two sets of costs ought to be allowed, as the widow had a beneficial interest distinct from and inconsistent with that of the co-executors; and that the former orders furnished a principle which the court ought to adopt on the present occasion.

*THE MASTER OF THE ROLLS:—Where several persons are made [*347] defendants in respect of a joint fiduciary character only, or if the beneficial interest which any of them may have in the matters of the suit is in no way conflicting with their other duty, they certainly ought to answer and defend together; if they do not, and there are no special circumstances, then, according to the settled rule of the court, they will be allowed one set of costs only. On the other hand, if one has a personal interest which conflicts with his duty as trustee, or if one of several trustees can admit facts which the others believe not to be true, it then becomes impossible for them with prudence to answer together. Whether they are entitled to two sets of costs depends on the circumstances of each particular case. If a party creates unnecessary expense it is just that he should be deprived of his costs; [1] and if several trustees unnecessarily sever their defences, it is right that one set of costs only should be allowed: the question always is, whether there was reasonable ground for them to sever.

[1] Vide *Booth v. Booth*, 1 Beav. 130. *Bennett v. Fowler*, ante, 302. *Christian v. Field*, 2 Haro, 185.

 1840.—Tinkler v. Hindmarsh.

The previous orders made in this case allowing two sets of costs have, I think, considerable bearing on the present question; and under all the circumstances I think two sets of costs must in this case be allowed.[1]

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*TINKLER v. HINDMARSH.

1840: February 28.

In an administration suit, the court authorized the legal personal representative to carry on newspapers which formed part of the assets, and a stationer for that purpose furnished paper on credit: Held, that he was entitled to be paid out of the fund in court forming part of the testator's estate, though such estate was insufficient to pay the testator's debts.

THE intestate in this cause was the proprietor of the True Sun and Weekly True Sun newspapers, and immediately on his death, in June, 1834, a creditor's suit was instituted for the purpose of having his estate administered.

By an order of this court, dated the 8th of November, 1834, it was referred to the Master to inquire and state whether it would be for the benefit of the estate that the newspapers should be sold, or whether it would be more for the benefit of the estate that they should be carried on and continued to be published for the benefit of the estate; and whether any other measures ought to be taken to prevent the publication of the newspapers, or any of them, from being suspended, and until he should have made his report, and until further order, Elizabeth Hindmarsh and Jane Tegg, the legal personal representatives, were to be at liberty to carry on and continue the same on the account and at the expense of the intestate's estate, and to retain and apply for that purpose such parts of the moneys belonging to the estate, or to arise from the publication and sale of the newspapers in the mean time, which should come to their hands, as should be necessary. The Master reported that it would not be for the benefit of the estate that the newspapers should be sold.

By another order dated the 22d of April, 1835, it was referred to the Master to inquire and state whether it would be proper that the newspapers
[*349] pers should be *carried on, and it was ordered that the administratrixes should be at liberty to carry on the newspapers at the expense of the estate in the mean time.

The Master, by his report dated the 7th of May, 1835, recommended that the newspapers should be sold for 2600*l.*, which was done in June, 1835.

[1] The two co-heiresses of a trustee, who lived at a distance from each other, were made parties to a suit for enforcing the performance of marriage articles: They submitted to act as the court might direct, and defended separately: it was held that they were entitled to two sets of costs. Lord Langdale, M. R. said: "According to the facts as now represented, these two ladies are the co-heiresses of the surviving trustee. They never acted in common in the performance of the trusts, nor did they ever undertake to perform the duty which belonged to their ancestor: they appear also to have been living at a distance from each other, and therefore I do not think that they come within that very salutary rule, which prevents trustees from severing in their defences, and putting money into the pockets of third parties, at the expense of persons beneficially entitled." *Aldridge v. Westbrook*, 4 Beav. 212.

1840.—*Tinkler v Hindmarsh*.

Messrs. *Pewtress & Co.*, having been informed by the legal personal representatives that the newspapers were to be carried on under the orders of this Court, continued after the testator's death to supply the paper necessary for the publication of the newspapers, down to the time of their sale, and in respect thereof 723*l.* became due to them.

Messrs. *Pewtress* now presented a petition to obtain payment of the 723*l.* out of a sum of 2407*l.* consols standing in the court to the credit of the cause, which, as was stated, had partially arisen from the newspapers, and to have it declared that they had a lien on such fund for the amount of their debt.

The estate was insufficient for the payment of all the intestate's debts.

Mr. *C. P. Cooper* and Mr. *Parker*, in support of the petition, contended that the amount ought to be paid out of the estate, or at least out of the part which had accrued from carrying on the newspapers, and which had in fact been produced by the capital of the petitioners; that the petitioners had trusted the court, and ought not to be put to their personal remedy against the administratrixes.

Mr. *Roupell*, contra, on behalf of the creditors of the intestate, opposed the prayer of the petition, and contended that the petitioners [350] had a lien on the actual produce of the papers only; and that the fund in court, which, he stated, had not been derived therefrom, was not liable to the petitioners.

Mr. *Pemberton* and Mr. *K. Parker*, for the administratrixes.

THE MASTER OF THE ROLLS :—This is a petition presented by gentlemen who are stationers, praying that they may be declared to be creditors upon the estate of the intestate, and to have a lien upon a particular fund for the amount of their claims.

The intestate in this case was the proprietor of certain newspapers, and in June, 1834, immediately or very soon after his death, this suit was instituted for the purpose of having the directions of the court taken, and for having the estate administered for the payment of his creditors. It appears, by the evidence before me, that very shortly after the death of the intestate, it was represented by the legal personal representatives that they intended to obtain the sanction of this court for carrying on the newspapers which had been conducted by the intestate; and that in the expectation that such an authority would be given the petitioners supplied paper. The court was in fact applied to in the following month of November, and an order was made,—not an order, as has been argued, by which this court took upon itself to carry on the trade, for a most absurd thing would it be for this court to make an order whereby it undertook to carry on a newspaper; but it was an order that it might be carried on at the expense of the estate. The legal personal representatives were to be at liberty to carry it on at the expense of the estate, and they did carry it on. The representations, therefore, [351] which had been made to the petitioners turned out to be correct. It must be assumed that it was for the benefit of the estate that it should be car-

1840.—*Ring v. Hardwick.*

ried on, and if so, it would seem that the expenses ought to be defrayed by all those who had any interest in the estate. The supply of paper commenced in July, 1834, and continued down to June, 1835; and in the month of May, 1835, a report was obtained that it would be proper to sell the copyright, and a sale actually took place on the 23d of June, 1835. During that time the supply of paper necessary for carrying on the trade, which the legal personal representatives were at liberty to carry on at the expense of the estate, was supplied by the petitioners. Some of the expenses were paid in ready money and some not. If the legal personal representatives had from time to time paid ready money for the supply of the paper, which they were justified in doing, it would have been repaid them out of the estate before any other persons having claims upon the estate could have received any thing.

Then comes the question, How is this balance to be paid? I must say, it does not seem to me material whether this fund of 2600*l.* was the produce of the newspaper or not; I certainly am not satisfied that it was. If it really were material to these parties to know what was the fund which was realized by the newspaper it ought to be inquired into, but I do not think that it is material. This is an expense which, with the leave of the court, was incurred for the benefit of the estate and of the creditors. It may unfortunately have turned out a losing concern, still it was done for the benefit of the estate; and though the experiment might fail, the expense, it would seem, must fall on the estate before the persons beneficially interested in it can receive any thing out of it.^[1]

[*352] *This claim is made as upon the balance of an account; it is necessary, therefore, that an account should be taken of the value of the paper supplied, and of the sum already paid to the petitioners, which must go in reduction of their demand.

RING v. HARDWICK.

1840: March 3.

Bequest to testator's wife for life, and after her death to make a division between the testator's four children, A., B., C., and D; his sons' shares to be paid immediately, and his daughters' shares to be invested for them for life, with remainder between all their children, to become vested at the age of twenty-five, with a gift over to the children of the others who should live to attain the age of twenty-five, in case either daughter should die without leaving any child who should live to attain twenty-five; with powers for the maintenance and advancement of such children. Held, that the gift over was too remote; and secondly, that the gift to the daughters in the first instance being absolute, and the attempt to limit it having failed, the absolute interest remained unaffected, so that the representatives of a daughter who died without children were entitled to her one-fourth share.

THE question in this case arose upon the will of William Davies, dated in 1825, whereby he gave his residuary personal estate to P. Hardwick, Wm.

[1] Vide *Cutbush v. Cutbush*, 1 Beav. 184.

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Clare, and his wife, Mary Davies, upon trust to convert and to invest in their names upon government security, and to pay the dividends and the rent of the leaseholds, &c., to his wife, Mary Davies, "during the term of her natural life or widowhood;" and he proceeded as follows:—"And from and immediately after the death or second marriage of my wife the said Martha Davies, then upon trust that they the said Philip Hardwick, William Clare and Mary Davies, or the survivors, &c., do and shall with all convenient speed collect in the outstanding parts of my said personal estate, and add the same to my money in the funds, and *make a division* of all the said money then in the funds, &c., and all and every other parts or part of my said personal estate *between all and every of my four children*, viz. my two sons, the said William Davies and James Davies, and my two daughters, the said Mary Davies and Martha Ann West." *He then provided that the [*353] "division" was not to be made into four equal parts; but that a sum of 2000*l.* should be appropriated and paid out of the shares of his sons, James and William Davies, "to or for the use and to augment *the shares* of his two daughters, the said Mary Davies and Martha Ann West, in equal shares and proportions, to be received by or for the use of them the said Mary Davies and Martha Ann West. And subject thereto the division of all and singular his said personal property at the decease or second marriage of his said wife, the said Martha Davies, was to be equal, share and share alike, between his said four children, viz. his said two sons, the said William Davies and James Davies, and his said two daughters, the said Mary Davies and Martha Ann West, the shares of his said two sons, the said William Davies and James Davies, were to be paid and transferred to them immediately upon the decease or second marriage of his said wife, the said Martha Davies, upon their first appropriating thereout, or otherwise paying the said sum of 2000*l.* to or for the use of, and to augment *the shares* of his said two daughters, the said Mary Davies and the said Martha Ann West; to hold the said shares unto them the said William Davies and James Davies severally and respectively, and their several and respective executors, administrators and assigns, from thenceforth absolutely for ever."

The will then contained a gift over between the surviving brother and sisters of the sons' shares, in case either died unmarried and without issue before their shares should become payable, and proceeded as follows:—"But as touching and concerning the shares of my said personal estate, which with the said augmentations will become the property of my said daughters, the said Mary Davies and Martha Ann West, upon the *de- [*354] cease or second marriage of my said wife, the said Martha Davies, my directions are, and I do hereby declare my will and meaning to be, that the whole of such shares and augmentations shall immediately upon the decease or second marriage of my said wife, the said Martha Davies, be invested and laid out upon government security at the Bank of England, under the superintendence of them, the said Philip Hardwick and William Clare, or the

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survivor of them, in manner following: that is to say, the share and augmentation of the said Mary Davies as hereinbefore mentioned, and also any other augmentation which may become her share by the decease of the said William Davies and James Davies or either of them unmarried and without issue, as is also hereinbefore mentioned, or by the decease of the said Martha Ann West, as hereinafter mentioned, shall be so invested and laid out in the names of the said Philip Hardwick, William Clare and William Davies, or the survivors, &c., jointly with and in the name of her the said Mary Davies, upon trust that they the said Philip Hardwick, William Clare and William Davies, &c., do and shall permit my said daughter, the said Mary Davies, to receive the dividends for life for her separate use;" "and from and after her decease then-upon further trust that they, the said Philip Hardwick, William Clare and William Davies, &c., do and shall pay, divide and transfer the capital money which formed the share and augmentation of my said daughter, the said Mary Davies, unto, amongst and *between all the children*, whether male or female, and both male and female of my said daughter, the said Mary Davies, in equal shares and proportions, and *to become vested in such children respectively at the age of twenty-five years*; and if any such children or child shall die under that age, the share or shares of all and every such children

[*355] who shall live to "attain that age; and if only one child shall live to attain that age, then the whole of such share and augmentation shall belong to such only child upon his or her attaining that age; and if it shall happen that the said Mary Davies shall depart this life without leaving any such children or child who shall live to attain the said age of twenty-five years, then the whole of the said shares and augmentations shall be upon trust, and shall be divided *between all the children* of the said William Davies, James Davies and Martha Ann West, whether male or female, and both male and female, *who shall live to attain the said age of twenty-five years*, in equal shares and proportions; and if only one such child shall live to attain that age, then the whole of such share and augmentations shall belong to such only child upon his or her attaining that age."

The testator declared similar trusts *mutatis mutandis*, of Martha Ann West's share, and contained the following powers of maintenance and advancement:—"Provided always, that in case of the death of the said Mary Davies or the said Martha Ann West before their children, or the children or child of either of them, shall have attained the said age of twenty-five years, or in case they the said Mary Davies and Martha Ann West, or either of them, shall depart this life without leaving any children or a child, and there shall be then living any children or a child of the said William Davies and James Davies, or either of them, but such children or child may not then have attained the said age of twenty-five years, it shall be lawful for the said Philip Hardwick, William Clare, and William Davies, &c., to receive the dividends of the share and augmentations of the said Mary Davies and Martha Ann West,

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or either of them, as the case may be, and apply the same dividends, or a competent part thereof, *for the education and maintenance* of the children or child of the *said Mary Davies and Martha Ann West, or of [*356] the said William Davies and James Davies, as the case may be, until such children or child shall attain the said age of twenty-five years, according to the true intent and meaning of this my said will as hereinbefore mentioned and expressed in respect thereof; and upon the same principle, in the event or events last aforesaid, it shall and may be lawful for the said Philip Hardwick, William Clare and William Davies, &c., with the consent of the said Mary Davies and Martha Ann West during their respective lifetimes, and after their deaths or the death of either of them, then in the discretion of the said Philip Hardwick, William Clare and William Davies, &c., by sale of any part of the said government securities, to raise and advance any part *of the share of any one or more of the said children for their advancement* in the world, not exceeding one quarter part of the probable expectant share of every one such."

The testator died in 1827; his widow survived him but a short time; his daughter, Mary Davies, married the plaintiff, Mr. Ring, and died in 1829, without having had any child born alive, and the plaintiff was her administrator. The testator's sons, William Davies and James Davies, were also dead, and had left children. Martha Ann West was living, and had children, two of whom were born in the testator's life.

The questions which arose upon the death of Mary Ring without children, as to the share intended for her and her children, were first, whether the gift over to the children of her brothers and sisters was too remote; and if so, then whether under the circumstances she took a life or an absolute interest in that share.

Mr. Pemberton, Mr. Purvis and Mr. Humphry for the plaintiff, contended, first, that the gift over between "the children of William [*357] Davies, &c., who should live to attain the age of twenty-five years," was too remote: *Vaudry v. Geddes*,(a) *Bull v. Pritchard*,(b) *Leake v. Robinson*,(c) *Cambridge v. Rouse*.(d)

Secondly, that the first gift in the direction, "to make a division of all his said personal estate between all and every his four children, Mary Davies, &c." was an absolute gift, and the attempt to restrict that interest by gifts to the children of Mary failing for remoteness, the absolute gift remained unaffected: *Whittell v. Dudin*,(e) *Carver v. Bowles*,(g) *Kampf v. Jones*,(h) *Arnold v. Congreve* (i) 'The plaintiff was consequently entitled as representative of his wife Mary.

Mr. Bethell, for Mrs. West; and

Mr. Kindersley for the representatives of William Davies, contended that the cases of *Kampf v. Jones*, &c., which arose on powers, did not apply, and

(a) 1 Russ. & M. 203.

(b) 1 Russ. 213.

(c) 2 Mer. 363.

(d) 8 Ves. 12.

(e) 2 J. & W. 279.

(g) 2 R. & M. 301.

(h) 2 Keen, 756.

(i) 1 Russ. & M. 209.

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that Mrs. Ring took a life interest only: that the gifts over were void, and that consequently there was an intestacy as to this share to which the next of kin were entitled.

Mr. *Tinney* and Mr. *Keene*, for the children of Mrs. West, contended that it was the practice of the court to construe more liberally provisions made for children: *Woodcock v. The Duke of Dorset*, (a) *Hougrave v. Cartier*. (b) That here there was a vested gift to the children, subject to be divested on a child's not attaining twenty-five, and which was not therefore void for [*358] remoteness: **Farmer v. Francis*. (c) That the direction for maintenance and advancement showed clearly that the children were to take beneficially previously to their attaining twenty-five, and prevented the rule of law against remoteness applying: *Murray v. Addenbrook*. (d) That this might be considered a gift with a double aspect; first, if Mary Davies had no children, or secondly, having children, they all died under twenty-five; and the first alternative having happened, the gift over took effect.

Mr. *Pemberton* having commenced his reply,

THE MASTER OF THE ROLLS said:—Upon the last point I will not trouble you. The children, on whose behalf this case has been argued, if they take any thing must take it under that clause directing a division between all the children "who should live to attain the age of twenty-five years." It is admitted, that a gift expressed by those words is by itself too remote and void; [1] but then it is said, there are other directions in the will which ought to qualify that construction. The directions are first of all, upon the death or second marriage of the wife to invest, &c., the particular share previously given to a daughter, in the name of the trustees. Then it is said, that in the subsequent clause, which refers to a period when the children are under twenty-five, that which was intended for the children is termed "the share" of the children, and that, therefore, the gift is vested, subject to be divested; but I consider this share means such share as had been before given, that is, a share for such as should live to attain twenty-five years, and this subsequent clause cannot therefore alter the effect of the previous gift. Next it is said to be a gift with

a double aspect. I am of opinion that that is not the true construction [*359] of the clause. In respect to the clauses for maintenance and for raising money for advancement, they are accessories to that which is void, and cannot therefore alter the construction. [2] Upon the other point as to the extent of the gift to the daughter, I will hear a reply.

Mr. *Pemberton* having replied,

THE MASTER OF THE ROLLS said:—I think that there is sufficient to be collected from the prior words in this will to give an absolute interest to the daughters; and those prior words are so connected with what follows as to

(a) 3 Bro. C. C. 568. (b) 3 Ves. & B. 79. (c) 2 Sim. & S. 505. (d) 4 Russ. 407.

[1] Vide *Griffith v. Blunt*, 4 Beav. 248.

[2] As to a gift becoming vested by direction for an advancement, see *Vivian v. Mills*, 1 Beav. 315. 1 Russ. & M. 208, n. 3. 4 Russ. 419, n. 1. Id. 432, n. 1.

1840.—*Rhoades v. Lord Selsey.*

show that the testator intended a restriction of that absolute interest ; and the restriction not having become effectual, the whole interest remained according to the original gift.[2]

RHOADES v. LORD SELSEY.

1840 : March 5.

The defendant wrote to his receiver and professional agent as follows :—" If you will remit the 400*l.* I can give you a note for it when you come to London." The money was advanced but no note was signed : Held, that a special contract must be inferred, and that interest was payable by the defendant.

THE plaintiff had been the steward, receiver and professional agent of the defendant, Lord Selsey : during his employment he had advanced to Lord Selsey a sum of 400*l.* for the purpose of discharging a debt due from Lord Selsey. In a letter, dated the 4th of May, 1817, written by Lord Selsey to the plaintiff, he expressed himself thus :—" I have just received an answer from the gentlemen to whom I told you I would pay the 400*l.* you promised me. If you will remit it to Drummond's, I can give you a note for it when you come to London." On the 7th of May Lord Selsey acknowledged "the receipt of the 400*l.*, but did not apply it in the way intended. The balance of accounts at the time between the parties did not appear. [*360]

No note was ever given by Lord Selsey for the 400*l.* ; one was, however, prepared by the plaintiff, but was never signed. The accounts between the parties were taken in the Master's office in this suit, and the Master had allowed for the amount of the stamp for the note, but disallowed the claim for interest on the 400*l.* ; and the question now discussed on exceptions to the Master's report was, whether the interest was under the circumstances payable.

Mr. *Pemberton* and Mr. *Chandless*, for the plaintiff, contended that there was sufficient evidence of a contract to entitle the plaintiff to interest on the note.

Mr. *Kindersley* and Mr. *Bethell*, contra, insisted that there was no promise or contract to pay interest ; that it must be inferred that the steward had paid the amount out of moneys of his principal then in his hands.

THE MASTER OF THE ROLLS :—I cannot assume, nor is it probable that these were moneys in the hands of Rhoades, which Lord Selsey had a right to say you shall apply to my use. Lord Selsey says, " If you remit 400*l.* I can give you a note for it when you come to London ;" what followed was, that the money was immediately remitted, and on the 6th of May the receipt of it was acknowledged by Lord Selsey.

[2] Vide *Blease v. Burgh*, ante, 226, where a preceding limitation is void for remoteness. Subsequent limitations founded on it, are also void. *Hone v. Van Schaick*, 7 Paige, 231.

 1840.—Kelsall v. Minton.

The question is, am I to conclude, under the circumstances, that [*361] there was a special contract between "the parties?" I think the evidence shows that if Rhoades sent the 400*l.* Lord Selsey was to give a note for it; the note was not in effect given, but the expense of the stamp was allowed by the Master to Rhoades in passing his accounts. What was wanted was the signature of Lord Selsey, which was to be affixed when Mr. Rhoades came to town: that was omitted, but there was nothing to alter the contract between the parties. I ought therefore to consider the rights of the parties as if the note had been signed; and the consequence is, that I must infer a special security on which interest was payable.

 KELSALL v. MINTON.

1840: March 9.

Where small sums are payable out of court to parties, an order will be made to pay them to the solicitor, he undertaking to distribute them; but it is necessary either that the petition praying payment to the solicitor should be signed by the parties, or that a written authority signed by the parties should be produced to the court, authorizing the payment to the solicitor.

A sum of 5*l.* 17*s.* was payable out of court between fourteen persons, and a petition was presented for that purpose.

Mr. *Young* asked, that to save expense to the parties, and particularly the expense of powers of attorney, which would otherwise be necessary, this sum might be paid to the solicitor, he undertaking to distribute it amongst the parties.

THE MASTER OF THE ROLLS said he was desirous of saving expense to these parties. but the rule which he had adopted, and which must be followed on this occasion, was, not to make any such order unless the petition praying for payment to the solicitor was signed by the parties, or unless a written authority was produced signed by the parties, stating that they were desirous that their money should be paid to the solicitor. This rule had been adopted for the purpose of satisfying the mind of the court that the parties [*362] were aware of their rights, "and of the amount they were entitled to receive. An authority being produced, he would make the order as asked in the present case.

 SMITH v. LANGFORD.

1840: March 12.

A testator, a victualler, directed his trade to be carried on by his executors, a brewer and spirit merchant who had been in the habit of serving him in his lifetime, and supplies were furnished for that purpose by them. The court would not declare that the executors were entitled to receive the cost price only for these supplies; but directed an inquiry whether the supplies were proper, and furnished at the ordinary market price.

THE testator, a victualler, authorized his executors and trustees to carry on

 1840.—Wainwright v. Hardisty.

his trade for the benefit of his family with full powers for that purpose. One of them was a brewer, and the other a spirit merchant, and had been accustomed to serve the testator in his lifetime. After the death of the testator they carried on the business, and furnished the supplies of beer and spirits.

The bill was filed by a party entitled to a share in the residue, to have the trusts of the will carried into execution.

The executors by their answers stated that they had charged a fair and current market price for the stores furnished after the testator's death.

Mr. *Lovat*, for the plaintiffs, now contended, that in the decree for taking the accounts, there ought to be a special direction that the executors should be allowed the cost price only for the supplies furnished by them: *Moore v. Frowd*.(a)

Mr. *Spence* and Mr. *Renshaw*, in the same interest.

Mr. *Rogers*, contra, contended that the plaintiff was entitled to the common decree only, and that the principle of *Moore v. Frowd* applied to professional persons alone; he did not, however, object to any inquiry as to the fairness of the charges.

*THE MASTER OF THE ROLLS said he could not make any such [*363] order as that asked; that all he could do would be to direct the Master in taking the accounts to see that the supplies were proper and furnished at the ordinary market price. That he could not suppose that the testator, who had himself directed his business to be conducted by these defendants, expected they would be deprived of the usual fair profit.

 WAINWRIGHT v. HARDISTY.

1840: March 13.

By a deed, which represented the wife to have the dominion over the fee of an estate, by means of a power, the wife appointed, and the husband and wife conveyed the fee by way of mortgage. The estate was really settled to the separate use of the wife for life, with remainder to the husband for life, with remainders over. The mortgage money was decreed to be raised out of the life estates.

By an indenture, which represented that under her marriage settlement, Mrs. Hardisty, by means of a power of revocation and new appointment, had the absolute dominion over the fee simple of an estate, it was witnessed that in consideration of 300*l.* paid to Mr. Hardisty, Mrs. Hardisty, in execution of her power appointed the property to the uses after mentioned, and Mr. and Mrs. Hardisty then conveyed it to the plaintiff, to secure the 300*l.* advanced to the husband.

It appeared, however, that Mrs. Hardisty had no such power, and that the estate was settled to her for life for her separate use, with remainder to her husband for life, with remainders over to other persons.

 1840.—Wainwright v. Hardisty.

Mr. Hardisty having become bankrupt, and the mortgage and interest remaining unsatisfied, the plaintiff filed this bill to have the amount due to him raised out of the life estates of Mr. and Mrs. Hardisty. The bill alleged that the plaintiff had advanced money on the faith of having a security on the fee, but that he afterwards discovered the true state of the title, which had been fraudulently concealed.

[*364] *The wife insisted that it was the intention of the parties that the fee should be subject to the mortgage, and that on that supposition, and on the faith of the settlement being void, she had joined. That the plaintiff was aware of her actual interest in the property having seen a copy of the settlement, and that he was of opinion that such settlement was invalid and had proposed to run the risk; and she insisted that she was not bound to give effect to the deed out of her separate interest. There was no evidence as to the fact produced by the defendants, nor was there any proof of any fraudulent concealment given on the part of the plaintiff.

Mr. Pemberton, and Mr. Keene, for the plaintiff, asked for the usual decree for an account and payment out of the life estates of the husband and wife. They cited *Sheldon v. Cox*.(a)

Mr. Piggett contra, for the husband and wife, contended that her separate estate was not liable to the payment of the mortgage money. That she had acted under a misconception of her interest in the property, and that it was intended to make the whole fee liable, and not to throw the burthen on her limited estate. That from the deed it appeared that she was dealing under her supposed power only, and not in respect of her separate estate.

That there was no case in which a contract had been established against a *feme covert* personally, but only through her trustees against her separate estate under some due appointment of it; so that here, there was neither a contract, nor, according to the intention of the parties, any appointment of the wife's separate estate.

[*365] *He did not object to the mortgage being charged on the life estate of the husband.

Mr. Ellis, for a trustee.

Mr. Koe, for the bankrupt's assignee.

THE MASTER OF THE ROLLS :—The principal question in this case seems to me to be, whether the interest of the wife is affected at all. There is no fraud proved by the defendants; and no step has been taken on behalf of the wife to set aside this deed; but the case comes before me simply upon the statement which is made, that the husband having occasion to borrow a sum of 300*l.*, applied to the plaintiff to lend it, and the wife offered as a security to appoint this property; and then the wife says in her answer, that there was some misrepresentation made to her as to the extent of her power over the property, which, however, is not proved.[1] Now, it seems that the in-

(a) 2 Eden, 224.

[1] As to the *onus probandi* in such cases, see *Field v. Sowle*, 4 Russ. 112.

1840.—Wainwright v. Hardisty.

terest which was intended to be appointed by the deed is not so appointed, because the terms of the settlement did not allow it. The question is, whether the deed is not to operate upon the interest which the husband and wife had, and upon that which the wife had a power to charge. It is truly said, that there is no personal contract, but then it is also argued that this is a contract with reference to her power, and not with respect to her separate property. I confess I am at a loss to know what it is, if it is not to operate on her separate estate under the settlement, for except in that way it could have no operation: [2] under the circumstances, as they are before me, I think that the deed ought to operate to the extent of the interest which the husband and wife had, and that the plaintiff is entitled to the decree he asks. [3]

*This is one of the very many cases in which the wife suffers for [*366] the want of the clause against anticipation. The separate interest intended for the wife has thus been left unprotected against the necessities and influence of the husband. [4]

[2] Vide *Owens v. Dickenson*, Cr. & Ph. 48, an important extract from this case will be found, 4 Russ. 114, n. 1. "I apprehend there are many ways in which a married woman may render her separate property liable to a charge, without having, in the transaction, made any direct charge on, or made any reference to, the property settled to her separate use." Lord Langdale, M. R., *Crosby v. Church*, 3 Beav. 489.

[3] "It is perfectly clear that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate; and, therefore, the inference is conclusive, that there was an intention, and a clear one on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound. Again, I apprehend it to be clear, that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the interest vested in her, the law will say that such estate as she may have shall be bound by her own act. But in a case where she enters into no bond, contract, covenant or obligation, and in no way contracts to do any act on her part:—where the instrument which she executes does not purport to bind or to pass anything whatever that belongs to her, and where it must consequently be left to mere inference, whether she intended to affect her estate in any manner or way whatever, the case is entirely different either from the case where she executes a bond, promissory note, or other instrument, or where she enters into a covenant or obligation by which she, being a married woman, can be considered as binding her separate estate. To create a charge, she must either enter into some obligation which can only be satisfied by resorting to her separate estate, or must convey, or agree to convey, some benefit, estate, or interest belonging to her in her separate character." Lord Langdale, M. R., *Tullett v. Armstrong*, 4 Beav. 423, 424. See further, *Field v. Sowle*, 4 Russ. 112, 114, n. 1. *Jaques v. Methodist Ep. Church*, 17 Johns. Rep. 548. *Hawley v. B adford*, 9 Paige, 200. *Stead v. Nelson*, ante, 245. *Crosby v. Church*, 3 Beav. 485. *Dowell v. Dew*, 1 Yo. & Coll. C. C. 345, 355.

[4] Though a particular mode of disposition be specifically pointed out in the instrument or deed of settlement, it will not preclude the wife from adopting another mode of disposition; unless there are negative words restraining her power of disposition, except in the very mode so pointed out. Therefore, if the wife enters into any agreement, clearly indicating her intention to affect by it her separate property, a Court of Equity, if there be no fraud, or unfair advantage taken of her, will apply her separate property to satisfy such engagement. *Jaques v. Methodist, Ep. Church*, 17 Johns. Rep. 548. S. C. 1 Johns. Ch. Rep. 450. 2 Johns. Ch. Rep. 543. 3 Johns. Ch. Rep. 77.

 1840.—Lucas v. Carline.

GREGORY v. THE ATTORNEY GENERAL.

1840 : March 17.

Bequest to trustees to be divided between the testator's wife and six poor members of a chapel, share and share alike. Held that the wife was entitled to one-seventh absolutely, and that the other six-sevenths formed a permanent charitable fund, the interest alone of which was from time to time payable to the poor.

THE testator gave as follows : " I give to the trustees or wardens for the time being of the chapel in Hackney, commonly called Mr. Cox's chapel, the sum of consols which may be in my name (as above stated) at the time of my decease, the interest of the same to be divided between my wife, Ann Gregory, and six poor members of the said chapel, share and share alike."

At his death the testator had 721*l.* 0*s.* 9*d.* three per cent. consols standing in his name, and the question was as to the construction of this gift.

Mr. *Pemberton* for the plaintiff, the widow of the testator, contended that she was entitled to a moiety of the fund, and that the other moiety was divisible, share and share alike, between the poor members ; and secondly, that they all took absolute interests.

Mr. *Wray*, contra, contended that the wife took one-seventh only of the fund, and that the poor were only entitled to the *annual interest* of the remaining six-sevenths, as it was clear the testator intended a permanent charity.

[*367] *Mr. *Pemberton*, in reply :—The testator could not have intended by the same words to have given an absolute interest to his wife, and a life interest only to the poor.

THE MASTER OF THE ROLLS was of opinion that the wife was entitled to one-seventh absolutely, and that the interest only was payable to the six poor members *de anno in annum*.

 LUCAS v. CARLINE.

1840 : March 17.

A testatrix bequeathed several legacies, and, amongst others, one to a servant, " if he should be residing with her at the time of her decease, but not otherwise ;" and she directed the said legacies to be paid " *within six months* after her decease," and declared that the legacies should not be vested until payable. The legatee died before the expiration of six months. Held that the representatives of the legatee were entitled to the legacy.

THE testatrix gave several legacies, and, amongst them, " gave and bequeathed unto her servant, William Lucas, if he should be residing with her at the time of her decease, but not otherwise, the legacy or sum of 100*l.*, and after giving other legacies, she " directed them to be paid *within six months* after her decease ;" and she declared " that the said several legacies or sums of money thereinbefore by her given and bequeathed should not become an

1840.—*Lucas v. Carlino.*

interest vested in the legatees until such time as the same should respectively be payable." The testatrix also gave other legacies respectively payable *within* twelve months after her death, and payable *at the end of twelve months* after her decease.

William Lucas was residing with the testatrix at her death, but died before the expiration of six months from the decease of the testatrix, and the question was, whether this legacy was payable to his representatives.

*The defendant denied that he got in within six months after the [*368] death of the testatrix personal estate sufficient to pay the legacies payable within six months.

Mr. *Pemberton* and Mr. *Glasse* in support of the claim for the legacy:—The legacy vested at the death of the testatrix, and was payable, not at the expiration but *within* six calendar months after; the direction to pay within six months was merely for convenience in the administration of her estate, and did not postpone the vesting of the legacy; *Garthshore v. Chalie*.(a) Some legacies are payable *within* twelve months, and others *at the end of* twelve months: this shows that the testatrix knew the difference. The rule of the court being to give interest at the end of twelve months only, the testatrix might here have intended that the legatee should have interest from the end of six months. The legatee at least is entitled to an inquiry, whether with reasonable diligence the legacy might have been paid before the legatee's death: *Law v. Thompson*.(b)

Mr. *Piggott* for the executor and residuary legatee, cited *Sidney v. Vaughn*,(c) *Lloyd v. Williams*.(d)

THE MASTER OF THE ROLLS:—The question in this case is whether upon the true construction of this will I am to consider the legacy now in question as a legacy which might become payable upon the death of the testatrix, or whether I am to consider it as a legacy which did not become payable till the expiration of the term of six months, within *which [*369] she positively said it was to be paid. I think that the best construction I can give is, that it was payable before the end of the six months in which they were authorized to pay it.

If the residuary legatees and the executors had been different persons, it would have been impossible for the former to have complained if this legacy had been paid within one month after her decease, nor can they complain if they fill the two characters. The legacy is payable within and not after six months, and I see no reason for attaching an additional condition that the legatee should live beyond the six months.

I am of opinion that the legacy was payable in the lifetime of this legatee, and that the plaintiff who represents him is now entitled to have the legacy paid if there are assets for that purpose.[1]

(a) 10 Ves. 13.

(b) 4 Russell, 92.

(c) 2 B. P. C. 347.

(d) 2 Atk. 108.

[1] As to postponed time of payment of a legacy, see the cases cited, ante, 226, n. 1.

 1840.—Davis v. Franklin.

DAVIS v. FRANKLIN.

1840 : March 7, 17.

Whether by the 12th General Order (1828) the Master can extend the time for making his report more than once, *quære*.

Where, in a proceeding before the Master, the defendant, by acquiescence or omission to object, permits the other party and the Master to proceed as if he did acquiesce, he comes too late if he does not come at the first opportunity to complain of the irregularity.

On a reference to the Master of exceptions for impertinence, he enlarged the time for making his report three times, and on the 19th of February, reported the answer insufficient ; on the 4th of March, the defendant gave notice of motion to take the certificates off the file, on the ground of irregularity, and of the Master's having power to enlarge the time only once : the court held that even assuming the Master's power to have been so limited, the defendant came too late, he not having previously taken the objection.

THE question in this case turned principally on the effect of the twelfth General Order, 1828, (a) which directs, that when any order is made [*370] referring an *answer for insufficiency, the order shall be considered as abandoned unless the Master's report shall be procured within a fortnight from the date of such order, "or unless the Master shall, within the fortnight, certify that a further time to be stated in his certificate is necessary in order to enable him to make a satisfactory report ; in which case the order shall be considered as abandoned if the report be not obtained within the further time stated," and the answer is then to be deemed sufficient.

In this case the common injunction had been obtained for want of answer. Exceptions to the answer for insufficiency were delivered on the 21st of December, 1839, and were afterwards shown as cause against dissolving the injunction, and the exceptions were on the 23d referred to the Master. By the terms of the reference, the plaintiff was to procure the Master's report on or before the 3d day of Hilary term, (13th January,) (b) or in default thereof the injunction was to stand dissolved without further order. On the 8th of January, notice of motion was given to produce documents admitted by the answer to be in the defendant's possession ; and an order to that effect was made on the 11th of January, 1840.

On the 13th of January, the Master being attended on the exceptions, certified that one week's further time was necessary in order to enable him to make a satisfactory report.

[*371] *On the 20th of January, the Master certified that ten days further time was necessary for that purpose ; and on the 29th of the same month he made a third certificate, certifying that six weeks further time was necessary. On the 19th of February he reported the answer to be insufficient.

(a) 2 Russ. App. 7.

(b) This was a special order made on the 23d of December, when an application was made to make the order *nisi* for dissolving the injunction absolute ; it was made in consequence of the whole fortnight allowed being in vacation time ; see 19th order (1828.)

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On the 4th of March, notice of motion was given on behalf of the defendant to take these four certificates off the file for irregularity, which now came on for argument.

Mr. *Pemberton* and Mr. *O. Anderdon*, in support of the motion, contended that this being a *special*, and not a general order of reference to the Master, he had no authority to extend the time at all; but treating it as a general order of reference, then, after one certificate of further time being necessary, the Master, under the twelfth order, had no further power of extending the time for making his report. That it had been so decided by the Vice-Chancellor in *Watkins v. Redman*.^(a)

Secondly, that the motion for production of documents on admissions in the answer affirmed its sufficiency, and was a waiver of the exceptions.

That the order of reference must consequently be considered abandoned, and the answer must at least be deemed sufficient from the 20th of January.

Mr. *Kindersley* and Mr. *James Russell*, contra, contended that the Master, if he considered it necessary, had the power from time to time to extend the period for making his report, otherwise great inconvenience *would [*372] result; and the Master, in the first instance, would be either compelled to name an unnecessarily long period for making his report, or the parties would be prejudiced by the inability of the Master to make it in time.

Secondly, that the motion to produce the documents was no waiver, and could only be taken advantage of on a motion to discharge the order of reference on that ground.

And thirdly, that if there had been any irregularity in the Master's proceedings, it had been waived and concurred in by the defendant, who had allowed the Master to proceed without making any complaint until the notice of motion on the 4th of March; that, by the practice of all the courts, an irregularity must be complained of at the earliest stage, otherwise it will be considered waived: *Routledge v. Giles*.^(b)

Mr. *Pemberton*, in reply:—No acquiescence could give the Master jurisdiction where the general orders of the court preclude it. You may waive your rights, but cannot, by any proceeding, give jurisdiction. *Candler v. Partington*.^(c) was also cited.

THE MASTER OF THE ROLLS:—This motion has nothing to do with the injunction, and the effect of the order to produce documents cannot now be considered: it might have been a ground for an application to stay the proceedings under the reference of the exceptions, but it was no ground for the Master refusing to proceed on that reference.

*The words of the twelfth order are very stringent; but I fully [*373] concur in all that is said respecting the inconvenience of holding that the Master can only enlarge the time once: the result would be that the

^(a) 2 Daniel's Pr. 316.^(b) 2 Cr. & Jer. 163. *Jervis*, New Rules, 68.^(c) 6 Mad. 102.

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Master would, in the first instance, be obliged to enlarge the time for months when a few days only might turn out to be necessary. It is said that the Vice-Chancellor has considered that the time once limited cannot be enlarged : I cannot say that this is so clear as not to be worthy of further consideration. If it should, on inquiry, turn out to be so, then comes the question of acquiescence. If this motion prevails, the result will be that the answer will be deemed sufficient, when by the Master's judgment it appears to be insufficient ; it is not, therefore, a case where the parties can be put right ; it would be extremely hard that the plaintiff should be put in such a permanent situation of disadvantage because the Master has proceeded in error.

March 17.—**THE MASTER OF THE ROLLS** :—This was a motion to take off the file four certificates of the Master, three of them being certificates by which he certified that further time was required to enable him to report as to the sufficiency of the defendant's answer, and the fourth being a report that the answer was insufficient.

The reference was made on the 23d of December last, and the plaintiff was to procure the Master's report, on or before the third day of Hilary term, or in default thereof the injunction which the plaintiff had previously obtained was to stand absolutely dissolved without further order.

[*374] *The plaintiff obtained an order for the inspection of the documents, which the defendant by his answer, which was excepted to, admitted to be in his possession.

He did not procure the report in time to save the injunction, but the Master proceeded on the reference ; and within the fortnight allowed by the twelfth general order of 1828, the Master certified further time to be necessary, and granted successively two other like certificates before he reported the answer to be insufficient.

It is objected by the defendant, *first*, that the form of the order (of 23d of December,) required that the plaintiff should procure the Master's report on or before the 3d day of Hilary term, and not having done so, the order ought to be deemed to be abandoned ; *secondly*, that the order of the 11th of January, 1840, for inspection of papers in the possession of defendants was made without any saving of the right to proceed upon the exceptions, and ought to be deemed a waiver of the reference ; *thirdly*, that under the twelfth general order of 1823, the Master has only authority to enlarge the time for making his report once ; and that after the time first given had expired the reference must be deemed to be abandoned and the answer to be sufficient.

The two first objections were disposed of at the time when the motion was made ; the third stood over for consideration, and to give me an opportunity of reading the affidavit, and ascertaining whether the objection, if valid, ought to be considered as waived.

I find that since the Vice-Chancellor's order in *Watkins v. Red-*
[*375] *man*, it has been considered, at least by some *of the Masters, that

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they have power to extend the time only once. I confess that if the subject had been *res integra*, I should, notwithstanding the strong words of the twelfth order, have been inclined to think that the Master might have extended the time contained in the first certificate, whenever the justice of the case required it. Great inconvenience may arise from imposing on the Master a necessity of granting a time which may be unnecessarily long in order to avoid the injustice which may be occasioned by the time contained in the first certificate being too short. The subject I think deserves consideration; it does not, however, appear to me to be necessary to decide the point in this case; for even on the supposition that the second and subsequent certificates were objectionable, if the objection had been taken in due time, it appears to me that under the circumstances which took place, the certificates ought not to be taken off the file.

The objections which the plaintiff insisted upon before the Master were, first, that the third day of Hilary term had gone by, and that the Master had no authority to proceed afterwards; and secondly, that a motion and an order thereon had been made for the production and inspection of papers. I am of opinion that the Master was right in not yielding to those objections. The objection, that the Master if authorized to extend the time once had no authority to extend it again, does not appear to have been made or suggested.

If the plaintiff was aware of the objection, I think that he ought to have stated it, and if necessary to have applied at the first opportunity to take the second certificate off the file; and even if he was not aware of it, I think that it would not be just to permit him to take advantage of a common error, in which he himself participated, to deprive the other party of his right to the result of that investigation before the Master, which was [*376] carried on without objection from him, on this ground.

The limitation of time in the twelfth order was meant for the benefit of defendants and with their consent, and if not by the Master, may, by the authority of the court without their consent, be enlarged so long as justice may require it; and if the defendant by acquiescence or omission to object permits the other party and the Master to proceed as if he did acquiesce, I think that he comes too late, if he does not come at the first opportunity, to complain of the irregularity. In this case he permitted the proceedings to go on for a month and a report to be made against him before he complained, and on the whole I am of opinion that this motion must be refused, and I think it ought to be refused with costs.[1]

[1] Vide *Becke v. Whitworth*, 3 Beav. 350.

1840.—Roberts v. Lloyd.

ROBERTS v. LLOYD.

1840 : February 18, March 21.

An obligor of a bond, after notice that it had been assigned on trusts, of the particulars of which there was no proof of his being cognizant, made payments to parties not entitled thereto, some by order of the trustee, and some to the executrix of the obligee, without such order: Held, that the obligor was not responsible to the *cestui que* trust for the former, but was liable to repay the latter.

Party suing in *forma pauperis*, and proving successful, declared entitled to ordinary costs.

ON the 25th of October, 1821, Lord Mostyn and Mr. Mostyn executed a bond in a penal sum for securing to Rebecca Roberts the sum of 1000*l.* and interest; and on the 12th day of February, 1828, Rebecca Roberts, having three daughters, Jane, the wife of James Batten, the plaintiff. Maria [*377] Catharine Roberts, and the *defendant Margaret Roberts, executed a deed poll, whereby, after reciting the bond, and that the sum of 1000*l.* remained due thereon, and that she was desirous of making provision for her daughters and the children of her daughter Jane, she assigned to the defendant David Lloyd, his executors, administrators and assigns, the said bond and the money due thereon, and her right and interest in and to the same, on trust to permit her, Rebecca Roberts, to receive the interest thereof during her life, and after her death to pay her daughter Jane the sum of 333*l.* 6*s.* 8*d.*, being one-third of the said sum of 1000*l.*, and as to the sum of 666*l.* 13*s.* 4*d.*, the remaining two-thirds of the money due on the bond, on trust to place out the same in government or other good securities, or to allow the same to remain on the present security, and to permit her daughter the plaintiff, and the defendant Margaret, to receive the interest and dividends thereof during their joint lives; and after the death of either to permit the other to receive the interest of one moiety thereof, and to pay the other moiety to the children of Jane Batten; and after the death of the survivor of the plaintiff and her sister Margaret, to divide the remainder of the 1000*l.* amongst the children of Jane Batten; and the deed poll contained a power of attorney to enable David Lloyd to get in the debt.

There was no direct evidence to show when Mr. Lloyd was first informed of the bond and of the deed poll, nor when notice of the deed poll was first given to Lord Mostyn; but on the 28th of July, 1823, Mrs. Roberts and Batten and wife informed Lord Mostyn that Mrs. Roberts had given them one-third of the money secured on the bond, to be paid on the death of Mrs.

Roberts, and was afterwards desirous that Jane Batten should have [*378] 100*l.* in her lifetime; and Mrs. *Roberts and Batten and wife then requested Lord Mostyn to pay 100*l.*, part of the 1000*l.* which he accordingly did; afterwards (in February, 1829,) Mrs. Roberts requested Lord Mostyn to pay the further sum of 233*l.* 6*s.* 8*d.* to Jane Batten, and that request was some time afterwards complied with. In a letter of James Batten,

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which accompanied this request, he stated the sum of 233*l.* 6*s.* 8*d.* to be due to his wife by assignment.

In this way the third part of the fund which was intended for Mrs. Batten after the death of Mrs. Roberts, was exhausted in her lifetime. How far Mr. Lloyd was cognizant of these payments appeared only by certain articles of agreement, bearing date the 23d day of May, 1831, and which were made and executed by and between Mr. Lloyd, of the one part, and William Batten, Joseph Batten and Jane Batten, the three children of Jane Batten, of the other part. These articles of agreement recited the bond and the deed poll, and, that by indorsements on the bond, dated respectively the 28th day of July, 1829, and the 29th day of April, 1829, the several sums of 100*l.* and 233*l.* 6*s.* 8*d.*, making together 333*l.* 6*s.* 8*d.* one-third part of the trust money, wereby orders under the hand of *Rebecca Roberts, and with the consent of David Lloyd*, advanced to her daughter Jane; and they further recited, that William, Joseph and Jane Batten, having occasion for 300*l.*, had applied to Mr. Lloyd for an order on Lord Mostyn for the same, which he had agreed to give them on their entering into the conditions after mentioned for payment of the interest to him as therein mentioned; and thereupon Mr. Lloyd promised to give an order upon Lord Mostyn for payment of the 300*l.*, and to accept from the three Battens 15*l.* annually in lieu of the lawful interest *of the same sum of 300*l.*, and the three Battens promised to pay that [*379] interest and to indemnify Mr. Lloyd.

These articles of agreement were dated the 23d of May, and on the 29th of August following, a receipt was given by James Batten to Lord Mostyn for 300*l.*, stated to be paid by virtue of an order made on Lord Mostyn by Mr. Lloyd, and that the money was part of a bond debt originally due to Rebecca Roberts, and afterwards by her conveyed to David Lloyd, on trust for uses; 100*l.*, part of this sum of 300*l.*, was in fact paid on the 28th of April, the remaining 200*l.* on the 29th of August.

After this payment, a sum of 366*l.* 13*s.* 4*d.* remained due on the bond. On the 28th of March, 1832, the further sum of 66*l.* 13*s.* 4*d.* was paid by Lord Mostyn to James Batten, who gave a receipt for it as paid by virtue of an order of Mr. Lloyd, and that the money was due on bond to Rebecca Roberts, and assigned by her to David Lloyd in trust for certain uses; and soon afterwards William Batten and Joseph Batten requested Mr. Lloyd to advance them a further sum of 100*l.* For this Mr. Lloyd required security; and on the 6th of June, 1832, William, Joseph and James Batten and Robert Davies executed a bond to Mr. Lloyd for 200*l.*, in which after reciting the deed poll, and that there was then due and owing to David Lloyd by virtue of the bond 300*l.*, and that he, David Lloyd, had agreed to advance to William and Joseph Batten 100*l.* on account of their shares on execution of that bond, the condition was stated to be for payment to David Lloyd of the interest of 100*l.* at 5*l.* per cent., during the lives of Rebecca Roberts, the plaintiff, and the defendant Mary Roberts.

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[*380] *On the 11th of June, three days after the execution of the last-mentioned bond, Mr. Lloyd signed an order for payment by Lord Mostyn to James Batten of another sum of 100*l.*, and Lord Mostyn accordingly paid it on the 27th of July, 1832.

'There was no evidence of any further act or interference on the part of Mr. Lloyd.

Mrs. Roberts died on the 22d of November, 1832, and Jane Roberts was appointed executrix of her will. At the time of Mrs. Roberts' death, the sum of 200*l.* remained due on the bond; and on the 30th of November, Lord Mostyn paid it to Jane Batten and James Batten, as it seemed, without any order or authority from Mr. Lloyd.

This bill was filed by Maria C. Roberts, who sued in *forma pauperis*, and it prayed a declaration that the defendant David Lloyd had committed a breach of trust in respect of the sum of 666*l.* 13*s.* 4*d.*, part of the sum of 1000*l.*, which was secured to be paid by the defendant Lord Mostyn to Rebecca Roberts deceased; and that the same sum of 666*l.* 13*s.* 4*d.* might be secured, and that Lord Mostyn might be declared to be answerable to the plaintiff for 200*l.* paid by him, and for any other sum which he paid with knowledge of the trusts in the bill mentioned.

Mr. *Pemberton* and Mr. *Kenyon*, for the plaintiff, contended that Lord Mostyn had notice of the settlement, and having, with such notice of the plaintiff's rights, paid the sum of 666*l.* 13*s.* 4*d.* to parties not entitled thereto, he was liable to repay it; that Lloyd was liable for the amount paid by Lord

Mostyn to parties under his order or with his concurrence; and [*381] *that the plaintiff would be entitled to a decree, and with costs, notwithstanding she sued as pauper.

Mr. *James Russell*, for the defendant Lloyd, contended that Lloyd had not full notice of the assignment of the bond; that the trusts had never been perfected by delivery of the bond to the trustee, or, so far as it had been proved, by communication with the plaintiff; that the transaction being voluntary, and the legal interest remaining in the settlor, this court would not carry it into execution. *Tufnell v. Constable*,^(a) *Edwards v. Jones*,^(b) *Coppin v. Dillon*.^(c) He contended, also, that the plaintiff, if successful, could only recover pauper costs.

Mr. *Stuart* and Mr. *Parry*, for Lord Mostyn, contended that Lord Mostyn had no notice of any trust in favor of the plaintiff, and that he had not seen any copy of the deed; that the payments by the direction of Lloyd at least were valid; and that the payment of the 200*l.* on the delivery up of the bond was good, *Mortyn v. Kingsly*; ^(d) that no effective transfer had been made of the bond, *Loveridge v. Cooper*,^(e) *Jones v. Gibbons*,^(g) as no notice of the

(a) 8 Simons, 69.

(c) Decided by the Lord Chancellor, Dec. 24, 1839.

(e) 3 Russ. 58.

(b) 1 Myl. & Cr. 226.

(d) Prec. Ch. 209.

(g) 9 Ves. 407.

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deed of trust had been served upon the obligor, as ought to have been done; and that the bond had been retained in the hands of the settlor.

Mr. *Pemberton*, in reply:—The trusts being well created, and being accepted by the trustee, cannot be impeached. This suit does not seek to establish the settlement of the bond against the *donor, but against [*382] a trustee for a breach of trust, and against the obligor for paying after notice of an assignment of the bond. *Legh v. Legh*, (a) *Ellis v. Nimmo* (b) were also cited.

March 21.—THE MASTER OF THE ROLLS:—It is plain that Mr. Lloyd was fully aware of the bond, and of the deed poll, and of the trusts conferred upon him; that he accepted the trusts, and took an active part in procuring payment from Lord Mostyn of different sums of money for purposes inconsistent with the trusts which he had accepted. There are the articles of the 23d of May, 1831, reciting the bond and deed poll, his consent to the payment of one-third part of the sum of 1000*l.* to Jane Batten, and showing the arrangement under which he was to procure payment of a further sum of 300*l.*, upon having payment of the interest thereof secured to himself. There is not, as against him, direct evidence of an order for the payment of the 66*l.* 13*s.* 4*d.*, but there is the subsequent bond, reciting that the sum of 300*l.* remained due to him, and this was the sum actually due after deducting the 66*l.* 13*s.* 4*d.*

It is clear, therefore, that not by his acquiescence alone, but by his acts, the three sums, amounting together to 466*l.* 13*s.* 4*d.*, were withdrawn from the security of Lord Mostyn's bond.

Now it is evident that Lord Mostyn had notice that the bond had been assigned to Mr. Lloyd, and he had recognized Mr. Lloyd as the person upon whose order the money was to be paid. On the 29th of August, 1831, he took from James Batten a receipt, stating that the money [*383] was paid by virtue of an order made by Mr. Lloyd, and that the money was part of a bond debt originally due to Rebecca Roberts, and afterwards by her conveyed to David Lloyd on trust for uses. On the 28th of March, 1832, he paid the sum of 66*l.* 13*s.* 4*d.* on a like receipt, stating an order of Mr. Lloyd, and that the money was due on bond to Rebecca Roberts, and assigned by her to David Lloyd, on trust for certain uses; and in July, 1832, he paid the further sum of 100*l.* on the order of Mr. Lloyd, which has been proved.

I do not think that Lord Mostyn is answerable for any of these sums: he had the authority of Mr. Lloyd for paying them, and was, I think, justified in making the payments.

But with respect to the 200*l.* paid after the death of Mrs. Roberts, he had no authority whatever; he paid the money on the receipt of Jane and James Batten, and on delivery up of the bond; but he knew that the right to the

(a) 1 B. & P. 447.

(b) L. & G. 333.

1839.—Cullingworth v. Lloyd

money due on the bond had been transferred to Mr. Lloyd, on trust for certain uses ; and I think that he might, and if he had been duly cautious would have refused payment without the authority of Mr. Lloyd ; and that if an attempt had been made to compel payment at law, this court would have protected him ; and, under these circumstances, I think that for the 200*l.* and the interest of it, he is answerable to Mr. Lloyd and the persons for whom Mr. Lloyd is trustee.

It is argued that the plaintiff has no right to any relief, because the gift or declaration of trust in favor of the children and grandchildren of Rebecca

Roberts was never complete ; and it was particularly relied upon that [*384] the bond and deed poll remained in the possession *of Mrs. Roberts up to the time of her death : upon this subject, however, there is no evidence. Jane Batten was appointed the executrix of Mrs. Roberts' will, and her husband, James Batten, had on several occasions acted as agent of Mr. Lloyd as to the bond. After the death of Mrs. Roberts, the bond was in the possession of James Batten ; when he obtained it, or whether as the agent of Mr. Lloyd, does not appear by direct evidence ; but all the circumstances concur in showing Lloyd accepted the assignment of the bond and undertook the trusts upon which the assignment was made : the bond ought to have been in his possession ; and it cannot be presumed that he acted as he did, without having it, as he certainly had a right to have it, in his power ; and I am of opinion that Mrs. Roberts did every thing incumbent on her to make the trust complete and valid, and that the plaintiff is entitled to the benefit of it.

I am therefore of opinion, that the plaintiff is entitled to have the 466*l.* 13*s.* 4*d.* paid into court by Mr. Lloyd and the 200*l.* paid by Lord Mostyn, and that she and her sister are entitled to have the interest paid according to the trusts of the deed poll, and, although a pauper, entitled to costs.[1]

[*385]

CULLINGWORTH v. LOYD.

1839 : November 14, 15, '16, 17. 1840 : March 21.

Upon a composition between a debtor and his creditors, a creditor cannot ostensibly accept a composition, and sign the deed which expresses his acceptance of the terms, and at the same time stipulate for or secure to himself a peculiar and separate advantage which is not expressed upon the deed.

A creditor holding a security for his debt may stipulate to have the benefit of it, in addition to the amount of the composition offered by a debtor to his creditors ; but he must either hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject, if he at all acts in common with them

A debtor entered into a negotiation for a compromise with his creditors, but there did not appear to have been any general meeting of them, or any agreement entered into by them generally, one of the creditors stipulated that he should have the benefit of a mortgage security which he

[1] As to costs of a party suing in *forma pauperis*, see farther, *Bolton v. Gardiner*, 3 Paige, 273-

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held, in addition to the amount of composition He accepted the composition, but did not then execute the composition deed; he afterwards realized his mortgage security, and then executed the composition deed, by which he purported to release his debtor altogether, without any reservation of the mortgage security; another creditor subsequently executed the composition deed. The agreement was not communicated to the other creditors, but there was no fraudulent concealment: Held, on grounds of public policy, that the creditor was not entitled to retain his mortgage security in addition to the amount of the composition.

A plaintiff partially succeeded, so as to be entitled to costs; but he failed in establishing unfounded charges of fraud, for the costs of which the court considered him liable. The court made a decree, without costs on either side.

In the year 1830 the plaintiff and Charles Addy were partners in the business of calico-printers at Manchester, and they had an account with Messrs. Loyd as their bankers. The plaintiff was separately entitled to a certain real estate, called the West Moor estate, which was situate in the county of Durham, and in June, 1830, the plaintiff deposited with Messrs. Loyd the title deeds of this estate, as a security for the balance which might be due to them from the firm of Addy & Cullingworth.

Towards the end of the year 1830, the plaintiff and Addy, being considerably indebted and embarrassed, determined to wind up their affairs, and on the 31st of December, 1830, they executed a power of attorney, whereby they empowered Edmund Grundy to act for them in that respect, and enabled him to pay the debts of the concern by an equal pound rate, without "preference or priority. The day previous to the execution of this [386] power of attorney, Edmund Grundy called on Messrs. Loyd, who were the principal creditors, and asked the advice of Mr. Edward Loyd as to an intended composition, and the defendant Mr. Edward Loyd thereupon stated that his house would accept a dividend equal with the other creditors, retaining, however, at the same time, the West Moor estate as a security for the balance which would be owing after the dividend had been received. To this Edmund Grundy, acting for the plaintiff, agreed; and he further suggested, that for the purpose of making the security more effectually available, it would be better to convert the equitable into a legal mortgage with a power of sale; and accordingly, by indentures of lease and release, dated the 10th and 11th of March, 1831, the plaintiff mortgaged the West Moor estate to Messrs. Loyd & Co. for 2024*l.* 15*s.* 2*d.*, and thereby gave them a power of selling the mortgaged property in case of default being made in payment of principal and interest on the 10th of September, 1831.

What was done by Grundy in the mean time for winding up the partnership business or promoting the composition, no further appeared in the cause than this, that he caused a deed of release to be prepared for execution by the creditors.

This deed, which was dated the 21st of October, 1831, recited that Addy & Cullingworth, being unable wholly to discharge their debts, had proposed to pay their creditors a composition of 10*s.* in the pound, which the creditors had agreed to accept in full satisfaction of their several debts. And it purported to witness, that each creditor executing the deed released Addy &

1839.—*Cullingworth v. Loyd.*

Cullingworth from the debt owing by them to him, and all interest
 [*387] **due thereon, and also from all securities given by Addy & Cullingworth or either of them, for securing payment of such debt; provided that any creditor might be at liberty to execute the deed without prejudice to any other lien or security which he might have for the debt against any other person.*

In the months of September and October, 1831, advertisements were published, giving notice to the creditors that they might receive a dividend of 10s. in the pound on their debts on executing the release, and several creditors executed the deed; but it did not appear that there was any general meeting of the creditors, or any agreement entered into by the creditors generally.

Sometime after the publication of the advertisements, and on the 13th December, 1831, Mr. Edward Loyd received from Edmund Grundy the sum of 1012*l.* 7*s.* 7*d.*, being the amount of the composition of 10s. in the pound on the whole debt due to the defendants. At the time when the payment was made the deed was not executed, and it was agreed between Edward Loyd and Grundy who represented the plaintiff, that the defendants should have the benefit of the security for the recovery of so much as they could of the remaining moiety of the debt.

The dividend was received in December, 1831, and soon afterwards Mr. Edward Loyd proceeded under the power to sell the estate. An agreement to sell for 800*l.* was entered into with Lord Howden on the 1st of February, 1832, and was made under circumstances which gave rise to another question in this case. The purchase, however, was completed, and the purchase
 [*388] money received by the defendants on the 1st of May, 1832, and it was applied in reduction of the debt which remained due to the defendants after they had received the composition; and on the 29th of June following, Mr. Loyd executed the deed. All the other creditors, with the exception of one who executed afterwards, had previously executed the composition deed.

It did not appear that the arrangement entered into between the plaintiff, by Mr. Grundy, and Messrs. Loyd was communicated to the other creditors.

This bill was filed in June, 1832, to set aside the mortgage of 1831, and insisted that by the execution of the composition deed the defendants, Messrs. Loyd, had given up their security upon the West Moor estate; and by amendments made in 1836 and 1837, personal fraud was charged against the defendants, and the sale to Lord Howden was sought to be set aside. All relief against his Lordship was however abandoned at the hearing.

Several creditors were examined, who proved, that they believed when they executed that all the creditors had agreed to accept the composition; and some stated that they would not have accepted the composition if they had known that Messrs. Loyd were to retain their securities in addition.

Mr. Pemberton, Mr. Kindersley and Mr. K. Parker, for the plaintiff, con-

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tended, that the legal mortgage of March, 1831, had been improperly obtained. . That by the established rule of law, the defendants, Messrs. Loyd, being parties to the composition deed, could not retain any advantage over the other creditors not expressed in the deed, or distinctly and clearly communicated to the body of creditors; and that by the *course of dealing [*389] in this case they had given up their claim upon the mortgaged estate; that the sale to Lord Howden was improvident and at an under value, and was made under such circumstances as to render the defendants liable for the whole value.

Mr. *G. Richards*, Mr. *S. Sharpe* and Mr. *Mylne*, for Messrs. Loyd, contended that there was no general agreement between the debtors and the creditors in this case, but a separate arrangement with each; that the defendants had always expressly and openly reserved their rights in respect of the mortgage, and that there had been no fraud or intention to conceal the terms of the arrangement. That the deed had not been executed until the security had been realized; and that the other creditors, except one, having executed the deed previously to Mr. Loyd, could not have been misled by it.

They argued also, that the sale had been proper, and for the full value at the time.

The cases cited in the argument will be found amongst those in note, page 395.

1840: *March 21.*—THE MASTER OF THE ROLLS:—The object of this bill is to have it declared, that a mortgage executed by the plaintiff to the defendants, Messrs. Loyd & Co, was not properly obtained, and to have the mortgaged estate re conveyed, or the value thereof paid by the defendants to the plaintiff.

On the 30th of December, 1830, when the first transaction between Grundy and Mr. E. Loyd took place, Mr. Loyd was entitled to insist on the benefit of his *security, and of all the other means which the law al- [*390] lowed him for recovering his debt; and with reference to the contemplated composition with all the creditors, he had a right to say as he did,—that he would not come into the agreement or arrangement for the composition unless he were allowed to make his security available for the residue of his debt; but this was a right which, considering the way in which the interests or the intention of other creditors might be affected by it, Mr. Lloyd could not act upon without either holding himself entirely aloof from the other creditors, or distinctly communicating with them on the subject if he acted in common with them at all. I think also that at the time to which I am referring, Mr. Lloyd had a right to say that he would not accept the dividend unless upon the terms of having his security converted into a legal mortgage, with a power of sale: and upon a consideration of the evidence, I am of opinion that the legal mortgage, which was not executed till after the lapse of more than two months from the suggestion of Edmund Grundy, was not improperly obtained. Whether the defendants were, under the circumstances

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which afterwards occurred, entitled to the benefit of the mortgage, is the next question to be considered.

The composition was contemplated and the power of attorney to Grundy was given in December, 1830, the mortgage to the Messrs. Lloyd was executed in March, 1831, and the power of sale attached in the following month of September.

It must be observed that Edmund Grundy was winding up the business under a power of attorney, which enabled him to pay the debts by an equal pound rate; but it does not appear that there was any general meeting [*391] of the creditors, or any agreement entered into by the creditors generally. The advertisements, however, show a proposition to the creditors at large to pay them all a composition on certain terms; and although every creditor was at liberty to refuse the composition, it is established by a series of decisions, that a creditor cannot ostensibly accept such composition and sign the deed which expresses his acceptance of the terms, and at the same time stipulate for or secure to himself a peculiar and separate advantage which is not expressed upon the deed; and in the case of *Leicester v. Rose*,^(a) it is stated by Mr. Justice Le Blanc, that in the consideration of cases of this nature, it is not material whether the agreement be entered into at a meeting of all the creditors assembled for the purpose, or impliedly by their affixing their signatures to the same deed carried round or produced to each separately, and signed by them: those who, by executing the deed, hold out that they come in under the general agreement, are not permitted to stipulate for a further partial benefit to themselves.

The deed not being executed by Edward Loyd, there was up to this time nothing in common between him and the other creditors: so far from agreeing to the terms expressed in the deed, one of which was, that securities giving by Addy & Cullingworth, or either of them, should be given up, he had expressly refused to do so, and that for the expressed and avowed purpose of retaining his right to make the security available for so much of the debt as was not discharged by the composition. He appears to have understood that the stipulation which he made for himself and his partners was to be made known to all the creditors, but he did not himself take any means to make it known.

[*392] *On the 29th of June, 1832, Mr. E. Loyd executed the deed, and thereby, for the first time, brought himself into community with the other creditors who had executed or might afterwards execute it. He had, in fact, received the same dividend as the other creditors, and had besides availed himself of the security given to him by the plaintiff; and although he seems to have considered, that as he had realized the security he might safely release the plaintiff and retain his advantage (as indeed I conceive he might have done by a proper method of proceeding,)[1] yet the question re-

(a) 4 East, 372.

[1] "The rule cutting off underhand agreements in cases of joint and general compositions, as

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main, whether after execution of the deed any other creditor could have understood, that between the time when he received the dividend and the time when he executed the deed he had realized the securities which the deed purported to release. It was, indeed, argued, that the securities mentioned in the deed were only mercantile securities, but it is evident that Mr. E. Loyd himself did not so construe the deed; and considering that no explanation of Mr. E. Loyd's signature was endorsed on the deed,—that no notice was given upon the deed that Mr. Loyd had received both the composition and the produce of the security it appears to me that the same principles of public policy which have governed other cases of this kind will deprive Mr. Loyd of his right to retain the advantage which his execution of the deed purported his intention to release; and in this respect, though not for all purposes, I think that his execution of the deed must, in equity, have the same effect as if he had executed the deed on the same day on which he received the dividend.

There is besides evidence, which though not very distinct, may be relied on, to show that there was at least one creditor who watched the conduct of Messrs. Loyd, the largest creditors, and refused to sign until "the Messrs. Lloyd had done so; and although Mr. E. Loyd ap- [393] pears to have stated at the time, to the person who asked him to sign, that having realized his securities he would sign (and this shows there could be no intention to mislead,) yet the fact of his intention to avail himself of his securities was not so stated as to guard other creditors from being misled; and under all the circumstances, I am of opinion, that having received the dividend and executed the deed, Messrs. Loyd had no right to retain the benefit of the money which arose from the security.

The next question is, whether Messrs. Loyd ought to be charged with more money, as the value of the estate, than the amount of the purchase money which they received from Lord Howden. The plaintiff has by his bill charged fraud against the defendants Messrs. Loyd, and against Lord Howden, and has prayed for a reconveyance of the estate; but the attempt to recover the estate from those who claim under Lord Howden has been abandoned, and the claim now is, that Messrs. Loyd, having sold the estate improperly, and at a greatly inadequate value, ought to be charged with the real value, to be now ascertained.

[His Lordship having gone minutely into an examination of the evidence on this point came to the following conclusion :—]

Looking at all the circumstances, and even considering Mr. Loyd to be a trustee for the plaintiff, which in one sense he was, I think that there is no

a fraud upon the other compounding creditors, and because such agreements are subversive of sound morals and public policy, has no application to a case like the present, where each creditor acts not only for himself, but in opposition to every other creditor, all equally relying upon their vigilance to gain a priority; which, if obtained, each being entitled to have satisfaction, the payment cannot be questioned." *Catron J. Clarke v. White*, 12 Peters, 200.

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thing in the conduct of Mr. Loyd respecting the sale of which the plaintiff has a just right to complain. Having himself given the power of sale, knowing the purpose for which it was intended to be exercised, the means [*394] which had *been taken to ascertain the value and the amount of the valuation, and having attempted to avail himself of the opportunity, which was afforded him, of preventing the sale by raising money, and having expressed his satisfaction at the promise not to sell for less than 800*l.*, and having, under these circumstances, permitted Mr. Loyd to sell, I think that the plaintiff cannot afterwards be himself permitted to say that the sale was made without his authority.

As to the value, there are estimates of great amount produced on behalf of the plaintiff, but we are not to consider the speculative value founded on estimates of the quantity of coal contained in the land, or the possible improvement in consequence of a railway then in contemplation, but the value of the land to be sold at the time, or what the estate would probably have sold for by public auction; and having given the best attention in my power to the evidence, it does not appear to me that more than the 800*l.* paid by Lord Howden would probably have been obtained, and I am therefore of opinion that the defendants are not to be charged with more than the purchase money which they received from Lord Howden.

Declare that the defendants Messrs. Loyd, having executed the deed of the 21st of October, 1831, and having received the composition or sum of 10*s.* in the pound upon their said debt, are not in respect of the said debt or sum of 2024*l.* 15*s.* 2*d.* due to them from Addy & Cullingworth, entitled to retain and apply the said purchase money or sum arising from the sale of the estate comprised in the indentures of the 10th and 11th days of March, 1831, in further reduction of the said debt; and decree the defendants to pay to [*395] the plaintiff the clear amount of such purchase money, *and interest thereon at 4 per cent. from the time when the same was received.

On a consideration of the costs of this suit, and having regard to the many unfounded charges of fraud contained in the bill, which make the plaintiff liable to considerable costs, and also to the defence which has failed, and in respect of which the defendants are liable to considerable costs, it appears to me that the justice of the case will be best answered by making a decree to the effect I have stated, without giving any costs to either side.(a)

(a) Note.—On the subject of agreements in fraud of composition deeds, between a debtor and his creditors; see *Child v. Danbridge*, 2 Vern. 71, (1688); *Small v. Brackley*, 2 Vern. 602, (1707); *Middleton v. Lord Onslow*, 1 P. Wms. 678, (1721); *Spurrett v. Spiller*, 1 Atk. 105, (1740); *Lord Chesterfield v. Janssen*, 2 Ves. sen. 156, (1750); *Smith v. Bromley*, Doug. 670, (1760); *Constantin v. Blache*, 1 Cox, 287, (1786); *Cockshott v. Bennett*, 2 T. R. 763, (1788); *Jackson v. Duchaire*, 3 T. R. 551, (1790); *Jackson v. Lomas*, 4 T. R. 166, (1791); *Cecil v. Plaiton*, 1 Anstr. 202, (1793); *Holmer v. Viner*, 1 Esp. 131, (1794); *Feise v. Randall*, 6 T. R. 146, (1795); *Butler v. Rhodes*, Peake's N. P. C. 238, (1795); *Eastbrook v. Scott*, 3 Ves. 456, (1797); *Fawcett v. Gee*, 3 Anstr. 910, (1797); *Stock v. Mawson*, 1 B. & P. 286, (1798); *Mawson v. Stock*, 6 Ves. 301, (1801); *Leicester v. Rose*, 4 East, 372, (1803); *Jackman v. Mitchell*, 13 Ves. 581, (1807); *Ex parte Sadler*, 15 Ves. 52, (1808); *Mackenzie v. Mackenzie*, 16 Ves. 372, (1809); *Ex*

 1840.—Wilson v. Mount.

*WHITTLE v. HENNING.

[*396]

1840: March 25.

Executors paid some interest on a legacy, and about nine years after the testator's death passed their accounts at the legacy duty office, showing a considerable residue: Held, that the legatee was entitled to an immediate decree for payment of the legacy, without first taking the accounts of the testator's estate.

THE testator died in 1815 having bequeathed a legacy of 2000*l.* to his daughter Ann. From his death some payments had been made from time to time by the executors on account of principal and interest on the legacy, and in 1824 the executors passed their accounts at the Legacy Duty Office, thereby showing a surplus of 7000*l.* or thereabouts, after payment of the debts and legacies, and they paid the legacy duty thereon.

Mr. *Pemberton*, for the plaintiff, asked for a decree for immediate payment of the legacy bequeathed to the testator's daughter.

Mr. *Treslove* and Mr. *Hallett*, contra, contended that no order for payment could be made until the usual accounts of the testator's estate had been taken.

The Master of the Rolls thought this a sufficient admission of assets to pay the remainder of the legacy, so as to entitle the plaintiff, a trustee, to whom an assignment thereof had been made, to an immediate decree for payment of the legacy, without previously taking an account of the testator's estate.

*WILSON v. MOUNT.

[*397]

1840: March 26, 30.

Bequest of a pecuniary legacy to A. for life, with remainder to B. for life, with remainder to the children of A. living at the decease of the survivor of A. and B., to be paid at twenty-one with benefit of survivorship in case of the death of any such children under twenty-one, with a gift over to X. if all such children died under twenty-one. A. had two children only, who attained twenty-one and died in A.'s lifetime, leaving children: Held, that the gift over to X. took effect.

THE question which arose on this petition depended on the construction of the will of Thomas Fletcher, which contained the following clause:—
 "Also I give unto the said William Mount, John March and Oliver Comwell, the further sum of 1000*l.*, upon trust to lay out and invest the same in their

parte Crowe, Mont. Bank, app. 497, (1810;) *Wheelwright v. Jackson*, 5 Taunton, 109, (1813;) *Payler v. Hymersham*, 4 M. & S. 423, (1815;) *Thomas v. Courtney*, 1 B. & Ald. 1, (1817;) *Harry v. Wall*, 1 B. & Ald. 103, (1817;) *Wood v. Roberts*, 2 Stark. 417, (1818;) *Wells v. Girling*, 4 Moore, 78, (1819;) *Jackson v. Davison*, 4 B. & Ald. 691, (1821;) *Greenwood v. Liddbetter*, 12 Price, 183, (1823;) *Lewis v. Jones*, 4 B. & C. 506, (1825;) *Knight v. Hunt*, 3 Moore & P. 18, and 5 Bing. 432, (1829;) *Britten v. Hughes*, 5 Bing. 460, and 3 Moore & P. 77, (1829;) *Coleman v. Waller*, 3 Y. & Jer. 212, (1829;) *Tuck v. Tooke*, 9 Barn. & C. 437, and 12 Moore, 435, (1829;) *Duffy v. Orr*, 1 Cl. & F. 253 and 5 Bl. 620, (1833;) *Lee v. Lockhart*, 3 Myl & Cr. 302, (1837.) [*Clarke v. White*, 12 Peters 178. *Russell v. Rogers*, 10 Wend. 473.]

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names, or in the names or name of the survivors or survivor of them, in the purchase three per cent. consolidated bank annuities, and to pay the annuities, and to pay the interest thereof, as the same shall from time to time become payable, unto my nephew Harry Mount, or permit him to receive the same during his life; and from and immediately after his decease, upon trust to pay the said interest unto the present or any future wife of the said Harry Mount, or permit her to receive the same during her life, and from and immediately after the respective deceases of the said Harry Mount and of his said present or future wife, upon trust to pay, assign, transfer and divide the said 1000*l.*, or the stocks or securities wherein the same shall be laid out and invested, unto and *amongst all and every such child or children of the said Harry Mount as shall be living at the time of the decease of the survivor of them the said Harry Mount and of such present or future wife* equally, share and share alike, and in case there shall be only one such child, then the whole to such only child to and for his or her own use and benefit, to be paid and transferred to him, her or them respectively, when and as they shall severally attain their ages of twenty-one years; and in case of the death of any

[*398] such child or children under his, her or their age or ages of twenty-one years, his, her and their respective part and parts and shares shall *go* and be paid to his, her and their respective brothers and sisters equally, share and share alike, at his, her or their age or ages of twenty-one years. And I direct that the annual produce of the part and share of each of such children shall be in the mean time laid out and applied in his, her or their maintenance and education, or otherwise for his, her or their use and benefit at the discretion of my said trustees. *And if all such child or children shall die under that age*, then from and after the decease of the said Harry Mount and the decease of such present or future wife, upon trust to pay and transfer *one moiety* or half part of the said 1000*l.* or the stocks or securities wherein the same shall be invested and placed out *unto* my said nephew William Mount, to and for his own use and benefit, and to pay the interest of the other moiety or half part thereof, as the same shall from time to time become payable unto my niece, Mrs. Jane Meyrick, wife of John Francis Meyrick, Esq., during her life, for her own sole and separate use and benefit; and after her decease to be divided amongst the children of the said Jane Meyrick in like manner, in every respect, as I have hereinafter directed with respect, to the sum of 1000*l.* next hereinafter given and bequeathed by me in trust for her and her children or child."

The testator then gave to trustees the further sum of 1000*l.*, upon trust to invest and pay the dividends to his niece, Mrs. Jane Meyrick, for her separate use for life; and he proceeded as follows:—"And from and after her decease, I give the said 1000*l.* or the stocks or securities wherein the same shall be invested, and also the moiety of the said 1000*l.* hereinbefore last mentioned, in case the same shall in the event hereinbefore mentioned become payable or transferable, and the interest thereof respectively *unto*

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and amongst all and every her children, *to be equally divided [*399] amongst them, if more than one, share and share alike, and if but one such child, then to such only child, to be paid and transferred to him, her or them respectively when and as they shall severally attain their ages of twenty-one years, in case the said Jane Meyrick shall be then dead, and if not, then upon her decease; and I direct that the interest of the part or share of each such child or children shall from time to time, as the same shall in the discretion of my said trustees amount to a competent sum, be laid out and invested in the like securities to accumulate and be paid or transferred to him, her or them, at his, her and their said age or ages of twenty-one years; and in case of the death of any such child or children under the age of twenty-one years, his, her and their respective parts and shares shall go and be paid to his, her and their respective brothers and sisters equally, share and share alike; and if all such children shall die under that age, then from and after the decease of the said Jane Meyrick, I give the said 1000*l.*, or the stocks or securities wherein the same and the interest thereof shall be invested, and also the said moiety or half-part of the said 1000*l.* before given to the said Mrs. Jane Meyrick and her child or children upon the event of the death of the said Harry Mount and his wife and children as hereinbefore is mentioned, unto my said nephew William Mount and my said nephew Harry Mount, equally to be divided between them."

Harry Mount had two children only, viz. Frances, who attained twenty-one in 1811, and died in 1834; and Charlotte, who attained twenty-one in 1822, and died in 1826. They both left issue.

Harry Mount survived his wife, and died a widower in July, 1838; and the question was who under these *circumstances, was now entitled to the first mentioned 1000*l.* [*400]

Mr. *Tinney* and Mr. *James Parker*, for the petitioners, the residuary legatees, contended, that as the event had not happened on which the gift over was to take effect, viz. as all the children did not die under twenty-one, the gift over failed; and that the fund was now undisposed of and belonged to the residuary legatees. They cited *Doe v. Brabant*,^(a) *Calthorpe v. Gough*,^(b) *Doe v. Shippard*.^(c)

Mr. *G. Richards*, for parties representing the daughters, contended that under the general intention of the testator they were entitled. He cited *Hope v. Lord Clifden*,^(d) *Mocatta v. Lindo*.^(e)

Mr. *George Turner* and Mr. *Barlow*, for the representatives of William Mount and Thomas Meyrick, the parties entitled under the gift over, contended that the gift over was intended to take effect on failure of the previous gift to the children of Harry Mount. That the case was like *Mackinnon v. Sewell*,^(g) which was a gift to Caroline for life, with remainder to her daughter.

(a) 3 Bro. C. C. 393, and 4 Term R. 706.

(c) 1 Doug. 75.

(e) 9 Simons, 56.

(b) 3 Bro. C. C. 395, n., and 4 Term R. 707, n.

(d) 6 Ves. 498.

(g) 5 Sim. 78, and 2 Myl. & K. 302.

 1840.—Wilson v. Mount.

ter Lydia for life, if she should survive Caroline and live to attain twenty-one, and if not, then to such other children of Caroline as should be living at their mother's decease and should attain twenty-one; and if all such other children should die under twenty-one, then over. Caroline survived all her children, but one had attained twenty-one; it was held, nevertheless, [*401] by the *Vice-Chancellor, and afterwards by the Lord Chancellor, on appeal, that the gift over took effect.

That if there had been no child, the gift over would have taken effect, *Aiton v. Brooks*,^(a) they also cited *Gower v. Grosvenor*,^(b) *Laroche v. Davis*,^(c) *Tawney v. Ward*.^(d)

THE MASTER OF THE ROLLS:—I cannot decide this case without first looking into the case of *Mackinnon v. Sewell*. There now exists a state of things which was not contemplated by the testator when he made his will, for otherwise he would, in all probability, have provided for the children of the children, and would have used proper words for that purpose. He has given a fund, in trust to pay the interest to Harry Mount for life, and then to his wife for life, and after the death of the survivor to transfer the 1000*l.* amongst all and every such children as should be living at the time of the decease of the survivor of Harry Mount and his wife. This confines the gift to such children as should be living at the death of the survivor; for in case of the death of any such child under twenty-one, his share is to be paid to his brothers and sisters; Mr. Richard's clients are therefore excluded; and the question which remains is, whether the gift over in the event of all such children dying under twenty-one takes effect, all the children having, in fact, attained twenty-one, but having died in the lifetime of their father. Are the words to be taken according to their strict meaning or not?

March 30.—THE MASTER OF THE ROLLS:—Since the petition was heard, I have taken an opportunity of reading the case of *Mackinnon v. Sewell*,^(e) [*402] and it appears that the words of the will in that case are of the same meaning and import as the words of the will in this case; it was, indeed, admitted that the literal meaning of the words is the same in both cases, and the only difference suggested was, that in this case the gift is of a pecuniary legacy, whilst in *Mackinnon v. Sewell* the gift was of a residuary estate; but I do not find that the judgment in *Mackinnon v. Sewell* was in any degree founded on the circumstance that the gift was residuary, and I cannot think that a different effect and operation ought to be given to words so similar, merely on the ground that the gift is not residuary.

I am therefore of opinion that the case of *Mackinnon v. Sewell* governs the present, and that upon the true construction of the will, in the events which have happened, the gift over, as to one moiety in favor of William Mount, and as to the other moiety in favor of Jane Meyrick and her children,

(a) 7 Sim. 204.

(d) 1 Beavan, 563.

(b) 5 Mad. 337.

(e) 2 Myl. & K. 202.

(c) 3 Y. & Col. 612, n.

[S. C. Coop. Sel. Cas. 224.]

1837.—Wiggins v. Peppin.

takes effect, and consequently that the prayer of this petition cannot be granted.(a)[1]

*WIGGINS v. PEPPIN.

[*403]

1837: December 19, 22. 1839: June 24, July 19.

A joint and several answer filed for two persons, by a solicitor having authority from one only, will not be ordered to be taken off the file on the application of one party in the absence of the other.

The retainer of a solicitor need not be in writing, but if he neglects taking that precaution, and his retainer being afterwards questioned, there is nothing but assertion against assertion, he must bear the costs of the risk he thus undertakes.

A motion for the taxation of a solicitor's bill, with special directions to disallow the costs of certain proceedings alleged to have been improperly taken by the solicitor, or with a qualification that the taxation was to be of the costs of such proceedings only as had been properly incurred, refused as such objections may be taken advantage of under the common order for a taxation.

A BILL had been filed to which a trustee had been made a defendant; he died before answering the bill, and a common bill of revivor was thereupon filed against his executors, William Clarke and Lydia Spriggs, in which no accounts were prayed. William Clarke alone, without any authority from Lydia Spriggs, gave directions to Messrs. D. and A., solicitors, to do what was necessary for the executors in the suit.

Some time afterwards Lydia Spriggs and William Clarke gave a retainer in writing to another solicitor, Mr. V., but Messrs. D. and A., acting under the previous authority, proceeded to enter an appearance for William Clarke and Lydia Spriggs, and filed their joint and separate answer, without oath or signature.

A motion was now made, on behalf of Lydia Spriggs alone, to take off the file a parchment writing purporting to be the joint and several answer of William Clarke and Lydia Spriggs.

Mr. *Pemberton* and Mr. *G. L. Russell*, in support of the motion.

Mr. *Bethell*, contra.

*December 19:—THE MASTER OF THE ROLLS:—With reference [*404] to William Clarke, who has answered jointly with Lydia Spriggs, it is necessary to consider the terms of the order proper to be made.

I am, however, of opinion that a solicitor has not, without authority, a right to enter an appearance or put in an answer for an individual.

The circumstances of this case are really extremely simple: [his Lordship stated the above circumstances.]

A considerable time after William Clarke had given the directions to Messrs.

(a) *Extract of Order*.—Pay the costs, and let one moiety of the residue of the fund be transferred to the legal personal representative of William Mount, and the other moiety to the legal personal representatives of Thomas Meyrick.

[1] Vide *Nordine v. Greenfield*, 7 Paige, 544. *McDonald v. Bryce*, 2 Keen, 284.

 1837.—*Wiggins v. Peppin*.

D. and A., Lydia Spriggs and William Clarke gave a retainer in writing to Mr. V., another solicitor, to attend to their interests in this cause; but notwithstanding this retainer in writing given to another solicitor, Messrs. D. and A., acting on the supposed authority which they had received from William Clarke, the brother, proceeded to enter an appearance, not for him only, but for Lydia Spriggs, from whom they had no direct authority, and as to the supposed authority from whom, they solely trusted to William Clarke. They not only entered an appearance for her, but they took on themselves to file a joint and several answer for her and William Clarke.

I believe it has been decided more than once, that it is not necessary that an authority given to a solicitor should be in writing; (a) further, it has been said—that it is the duty of the solicitor to take care that he has sufficient evidence of the authority; and if he neglects the precaution of obtaining it in writing, and his authority is afterwards challenged, he will, for [*405] want *of written evidence, be treated as if he had no authority at all; I think the cases go to that length.

Then how is it in this case? The solicitors have no authority whatever, they never had any communication with this lady, and they have trusted wholly to her brother. She denies that she ever gave any such authority, and has given a retainer in writing to another solicitor; Messrs. D. and A., in consequence of not using proper precaution, have filed an answer and have incurred expenses without any authority from her.

Then comes the question, whether a solicitor has a right, without any authority from or communication with the party, to appear for him in the cause, to take upon himself to say that an answer without oath or signature may be safely put in, and accordingly to put in such answer. It would, I think, be very improper to afford any countenance to such a proceeding.

I have no doubt on the merits of this case, but I shall consider the terms of the order, so far as respects the interest of William Clarke. I desire, for my own satisfaction, to look into the authorities that bear on this subject.

*December 22:—THE MASTER OF THE ROLLS:—*I have looked at the authorities, and they entirely bear out the opinion I expressed the other day, that if an authority be not given in writing, and the authority is denied, and there is nothing but assertion against assertion, the solicitor must bear the costs of the risk he thus undertakes; (b) at the same time there [*406] may be *subsequent conduct, from which an acquiescence may be inferred, and that will make a difference.[1] There is nothing of

(a) *Lord v. Kellett*, 2 Myl. & K. 1. (b) See *Wright v. Castle*, 3 Mer. 12.

[1] In a previous case, Lord Langdale, M. R., said: "According to the strict practice, there ought to be a warrant in writing to authorize the solicitor to commence proceedings; it is sometimes, however, dispensed with, at the peril of the solicitor; had the party here acquiesced, it would be another question." *Tabbner v. Tabbner*, 2 Keen, 680. "As a general rule, when a suit is commenced or defended, or any other proceedings is had therein, by one of the regularly licensed

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that description here, and if this motion had been regularly brought on, I should have no doubt as to the order to be made, to take off the file a parchment writing purporting to be the joint and several answer of William Clarke and Lydia Spriggs; [1] it is impossible, however, to do that in the absence of William Clarke, and William Clarke not being served in the regular way, I am afraid I cannot, in the present state of things, make any order; I cannot in his absence do that which I am asked to do.

Lydia Spriggs subsequently discharged Mr. V. and retained Messrs. D. and A. in the suit; the motion was not therefore prosecuted. Mr. V. having delivered his bill of costs to Lydia Spriggs for these proceedings, amounting to 88*l.*, commenced an action for the amount, and arrested her.

A motion was afterwards made on her behalf before the Lord Chancellor, to restrain proceedings in the action. His Lordship, however, refused the application.

June 24:—It was now moved, before the Master of the Rolls, on behalf of the defendant, Lydia Spriggs, that it might be referred to one of the Masters of this court to tax the bill of costs amounting to 88*l.* 2*s.* 9*d.*, delivered by Mr. V. to her, other than and except the costs of certain proceedings mentioned in the notice of motion, which it was prayed might be wholly disallowed; or otherwise that the Master might tax the costs of all the proceedings which had been properly taken on behalf of the *defendant, Lydia [407] Spriggs, and that Mr. V. might be restrained from all proceedings in the action at law brought by him against Lydia Spriggs.

Mr. *Bethell*, in support of the motion, contended, that this lady ought to be relieved from the costs of a proceeding quite unwarranted, which, from

solicitors, it is not the practice of the court to inquire into his authority to appear for his supposed client. But if the party for whom such solicitor appears, or assumes to act, denies his authority, and applies to the court for relief before the adverse party has acquired any rights, or suffered any prejudice in consequence of the acts of the solicitor, the court may correct the proceeding, and may compel the solicitor, who has assumed to act without authority, to pay the costs to which the parties have been subjected in consequence of his improper interference. In cases, however, where the adverse party has acquired rights, or been subjected to costs, by proceedings in the name of a party, who afterwards denies the authority of the attorney or solicitor who has thus proceeded, the courts are in the habit of permitting the proceedings to stand, where the solicitor or attorney is a responsible man; and leaving the party injured by such unauthorized proceedings in his name, to seek his redress against such solicitor or attorney, by a summary application to the court, or otherwise." Walworth, Ch., *The American Ins. Co. v. Oakley*, 9 Paige, 498. This case is cited 2 Keen, 680, n. 1. It was thought advisable to introduce a fuller statement in this place. The fact that a party,—knowing that his name has, without authority, been introduced as plaintiff by the solicitor of some of the other plaintiffs in a suit,—does not take any active steps to have his name expunged from the record, is not, as between that party and the solicitor, equivalent to a retainer, or an adoption of the latter as his solicitor. *Hall v. Laver*, 1 Hare, 571. A party to a cause, for whose benefit, in common with others, the cause has been prosecuted, cannot avail himself of the benefit resulting from the suit discharged of the expenses of it, although he might have been made a party without his authority. *Ibid.*

[1] As to taking answer off the file, see further *Denison v. Bassford*, 7 Paige, 372.

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the commencement, it must have been apparent would terminate unsuccessfully, and from which she could not by possibility have derived any benefit.

Mr. *Pemberton* and Mr. *G. L. Russell*, contra, contended that the retainer having been proved, Lydia Spriggs was entitled to the common order for taxation only; that no special directions could now be given to the Master to proceed in any other than the ordinary mode in the taxation of the bill of costs; and that under the common order, the Master would take notice of all objections.

July 19.—THE MASTER OF THE ROLLS:—Lydia Spriggs having retained and employed Mr. V. as her solicitor, and Mr. V. having delivered his bill of costs, she is entitled to the common order for taxation of the bill, on the usual terms. The question is, whether she is entitled to any other or different order.

Lydia Spriggs and her brother, a Mr. Clarke, were defendants to a bill of revivor: Mr. Clarke, as Lydia Spriggs has sworn, without her authority, employed Messrs. D. and A., as solicitors, to act for both; and those gentlemen, thereupon appeared and put in an answer for both, without oath or signature.

Lydia Spriggs, however, thought fit, or was induced, not to acquiesce [*408] in that proceeding; and on the suggestion, as it seems, of Mr. *Shuttleworth*, she retained and appointed Mr. V. to act for her; he did so, and adopted proceedings on her behalf, to have the answer put in for herself and her brother taken off the file. Before these proceedings were brought to a close, she dismissed Mr. V., and thought fit, or was induced, to employ the solicitors who were first engaged on her behalf by her brother.

Mr. V.'s bill was incurred in these proceedings, and she now desires that the reference for taxation may be accompanied by a disallowance of the greatest part of the bill, or by a qualification, that the taxation is to be of the costs of such proceedings only as have been properly incurred.

It appears, from the facts stated in the affidavit, that the case of Lydia Spriggs is a very unfortunate one: she has been led into an expense which turns out to be entirely useless, and was probably led into it by the competition of two solicitors, who, after all that has passed, would have done well to unite their endeavors to save her harmless; but the case is clear that she retained Mr. V., and by two affidavits, one made in July and the other in November, last, she recognizes the retainer, and insists upon his being her solicitor; and when he has thus acted under her authority, thus solemnly recognized and confirmed, and in the absence of any fraud, the question is, whether there ought to be any special direction or qualification in the order for taxation, and I think that there ought not. (a) [1]

(a) An appeal was presented to the Lord Chancellor, who, having ascertained the practice to be that the Masters, under the common order for taxation would take into their consideration the objections here complained of, affirmed the order of the Master of the Rolls.

[1] Vide *In the matter of Rice*, 2 Keen, 181. *Jones v. James*, id. 184. S. C. 1 Beav. 307. *Russell v. Buchanan*, 9 Sim. 167.

1840.—Johnson v. Woods.

*JOHNSON v. WOODS.

[*409]

1840 : February 26, 29.

A testator gave his real and personal estate to trustees, upon trust with all convenient speed to convert into money ; and he directed them, at the end of twelve months after his decease, to invest the sum of 600*l.* out of his *personal estate*, in trust for a charity ; he also directed them at the end of twelve months after his decease, (*all his property being personal*), to lay out the residue for other charities. The realty was sold : Held, that the 600*l.* was not payable out of pure personalty, but out of the mixed fund : and that this gift, and the gift of the residue were rendered void by the mortmain act, in the proportion which the realty bore to the personalty ; Held also, that the realty was not converted to all intents, so as to entitle the next of kin to the fund released in consequence of the invalidity of the gift of the real estate to charity.

THE testator in this cause, by his will, dated in 1832, gave, devised, and bequeathed all his real and personal estate whatsoever and wheresoever to the defendant Woods and two other trustees, upon trust, with all convenient speed after his death, to dispose of all his freehold and leasehold estates and premises, with the appurtenances ; and also to sell and convert into money, except as was thereafter excepted, all such part of his personal estate and effects as should not consist of money ; and he directed his executors to stand and be possessed of and hold the moneys to arise or be gotten by the means aforesaid or otherwise under or by virtue of that his will, in trust in the first place to satisfy his debts, funeral and testamentary expenses, and certain legacies ; and he directed that his trustees “should, at the end of twelve months next after his decease, invest the sum of 600*l.* out of his *personal estate* in the purchase of parliamentary stocks or funds of Great Britain, or upon real or other security, at interest, with full power to vary or change the same funds and securities, at their discretion, for the general good and benefit, but without impeachment of waste, upon the trusts thereafter mentioned, that is to say, in trust to pay the interest, dividends, and other proceeds of the funds and securities upon which the said sum of 600*l.* should be so invested, &c., unto his wife for her life, or during her widowhood, and at the death or *marriage again of his wife, in trust to pay, assign transfer, and [*410] assure the said sum of 600*l.* and the funds and securities whereupon the same might be placed or invested” unto certain trustees, upon trust “to pay the income thereof unto the minister for the time being of the dissenting chapel at Rainford, so long as he should preach agreeable to the thirty-nine articles of the Church of England, and teach the Assembly’s catechism ;” in default thereof he directed the trustee to expend the income of the funds in the purchase of linen and woollen cloth for the poor of Rainford. And he also directed that his trustees should, at the end of twelve months next after his decease, *all his property being personal*, pay, lay out, and expend, invest, and dispose of all the rest, residue, and remainder of his personal estate and effects whatsoever (save and except what was thereinbefore mentioned and disposed of) into two equal moieties or shares, and invest one moiety in the parliamentary stocks or funds of Great Britain, or upon real or other security

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at interest, with full power to vary the same, in trust to pay one equal half part of the residue as aforesaid unto certain trustees, in trust to lay out the income thereof in the purchase of good and sufficient and warm bed-clothing, in quilts, blankets, and sheets, and distribute the same amongst the poor of Rainford. The testator then "directed his trustees to invest the other moiety or share of the rest and residue in parliamentary funds, or upon real or other securities, and assign the same to trustees; and he directed the income thereof to be paid into the proper funds of the Foreign Missionary Society."

The testator died shortly after making his will, and all his estate, whether real or personal, not consisting of money, had been since converted into money.

[*411] *The bill, which was filed by some of the next of kin of the testator, prayed a declaration, that the gift of 600*l.* and of the residue was void:—that the real estate of the testator had been converted into personalty by his will, and was distributable among the testator's next of kin, and for the usual accounts.

Accounts and inquiries were directed at the original hearing, and the cause coming on for further directions upon the Master's report,

Mr. *Kindersley* and Mr. *Walker*, for the plaintiffs, contended, that the gifts to charity were void under the mortmain act, as regarded the real estate; that there was a conversion of the real estate into personalty, and that the next of kin were entitled to the portion released by the invalidity of the gift to charity. They cited as to the costs *Roberts v. Walker*,^(a) and as to conversion *Durour v. Motteux*,^(b) *Green v. Jackson*,^(c) *Phillips v. Phillips*,^(d) *Amphlett v. Parke*.^(e)

Mr. *Treslove* and Mr. *S. Sharpe*, for the widow, cited *Mallabar v. Mallabar*.^(g)

Mr. *Tinney* and Mr. *Keene*, for the other next of kin.

Mr. *G. Richards*, for the heir at law, contended that the conversion was limited to the purposes for which the realty, when converted, was intended to be applied; that by the failure of those purposes, the apportioned part of the realty belonged to the heir at law; *Ackroyd v. Smithson*.^(h) As to costs he cited *Paice v. The Archbishop of Canterbury*,⁽ⁱ⁾ *Bootle v. Blundell*.^(k)

[*412] *Mr. *Spence* and Mr. *Chapman*, for the legatees of 600*l.*, contended that the gift was perfectly valid, as the testator had directed it to be invested "out of his personal estate." They cited *Dixon v. Dawson*.^(l)

Mr. *Wray*, for the Attorney General.

Mr. *Ellis*, for the trustees of the Rainford Chapel.

(a) 1 Russ. & Myl. 752.

(d) 1 Myl. & K. 649.

(h) 1 B. C. C. 503.

(k) 1 Mer. 193.

(b) 1 Ves. sen. 320.

(e) 2 Russ. & Myl. 221.

(i) 14 Ves. 364, and 1 Russ. & Myl. 759, n.

(l) 2 S. & St. 327.

(c) 2 Russ. & Myl. 238.

(g) Ca Temp. Talbot, 78.

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Mr. *Pemberton* and Mr. *Blower*, for the London Missionary Society.

Mr. *Romilly*, for the executors.

Mr. *Kindersley*, in reply.

THE MASTER OF THE ROLLS :—In this case, as in all other cases of the like kind, the difficulty is to apply a general rule to a particular case.

I apprehend it to be clearly settled, that where a testator devises land to be sold, and directs the produce of the sale to be applied to purposes which do not exhaust the whole beneficial interest, the interest which is not exhausted belongs to the heir. Moreover, it is a rule, that the heir is not to be excluded by the fact of an actual conversion of the real estate into money, but only by the disposition which the testator has made of the money which constitutes the unexhausted beneficial interest. So where a testator, having devised his real estate to be sold, has mixed the produce with the personal estate, and has given the combined fund for purposes which do not exhaust the whole beneficial interest, in that case, again, so much of the fund remaining undisposed of or unexhausted, as consists of the produce *of the real [*413] estate, belongs to the heir,—in other words, as was said by Lord Roslyn, where the court has no direction from the testator how the money arising from any part of his real estate shall go, it rests with the heir at law; the consequence is, that in every case of this kind the court must look to the disposition which the testator has made by his will, of the unexhausted interest arising from his real estate.[1]

It is undoubtedly practicable for a testator to say that his real estate shall be sold, and that the produce shall go to such persons as by law are entitled to his personal estate; not only may a testator say that directly, but he may use expressions in his will which, without directly stating it, lead to the same conclusion. When, therefore, it can be ascertained that the testator intended that the produce of his real estate should, to all intents and purposes, be treated as personal estate possessed by him at the time of his death, so as to devolve upon the persons entitled to his personal estate, the court will give effect to that intention; and in all cases of this description, the question is, whether that intention is directly expressed, or must be necessarily inferred from the words used in the will.

In the present case the testator has made one common fund, consisting of the produce of the real estate, the leaseholds, and all the other moneys which the executors might get in under the authority of the will. They are to hold, after satisfying certain previous trusts, “upon further trust that they do and

[1] Upon the principles of equitable conversion, the proceeds of real estate directed by the testator to be sold, are only considered as converted into personalty for the purposes of the will; and if any estate or interest in the fund arising from the sale is not legally and effectually disposed of by the will, there is a resulting trust, as to such estate or interest, in favor of the heir at law. *Wood v. Cone*, 7 Paige, 472. See further the next note. 2 Sim. & Sta. 194, n. 1. *Watson v. Hayes*, 5 Myl. & Cr. 125. *Hereford v. Ravenhill*, 1 Beav. 481. *Houghton v. Houghton*, 11 Sim. 491. *Wright v. Trustees of Methodist Episcopal Church*, 1 Hoff. Ch. Rep. 221.

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shall, at the end of twelve months next after his decease, (all his property being personal,) pay, lay out, expend, and invest, and dispose of all the rest, residue, and remainder of his personal estate and effects whatsoever," upon certain charitable purposes, which he mentions.

[*414] *These charitable purposes fail, so far as the fund arises from the real estate, or from any other part of the testator's property than the pure personalty; the charitable purposes failing, there is, therefore, no disposition of that part of the residue, which, by direct words, takes it from the heir; and the question then is, whether there are any expressions which have the effect of making the whole fund, or the whole of the testator's real and personal property, personal estate at the time of his death, so as to exclude the heir. I think it evident that the testator himself calls it "personal estate," not for the purpose of adding it to any personal estate otherwise disposed of by his will, but merely for the purposes of distribution amongst the several charities, he considering, as he expresses it, his property as being personal at a certain time when the sales have been effected, namely, twelve months after his decease. Am I then really to consider this mode of mentioning the mixed fund as "personal estate," as amounting to a direction in the will, that the real estate should be sold, and the moneys to arise by the sale should be treated and considered as a part of the testator's personal estate? I am of opinion, that I cannot consider the words "personal estate," which occur in two places in his will, as words which lead to the conclusion that the testator intended his whole property to be treated as personalty at the time of his death so as to go to the persons who would be entitled to the undisposed of personal estate. It is clear it was his intention, and his wish to have his real estate converted into personal estate, in order merely to have it applied to the purposes of his will, and which purposes, so far as they are charitable and affect the real estate, fail. I am of opinion, therefore, that the heir is entitled to so much of the residue of the mixed fund as has arisen from the sale of the real estate.[1]

[*415] *Another question has been raised with respect to the legacy of 600*l.*, which the testator directed his trustees to invest, at the end of twelve months next after his decease, "out of his personal estate." In a sub-

[1] So, in a later case, in which a testator created a mixed fund, one object of which failed, Lord Langdale, M. R., said: "The real estate is by the will directed to be converted into money, i. e. into personal estate, for the purposes of the will; the testator thereby determined the quality of the property which the legatees were to take; but he has expressed no intention to convert it for any purposes, other than those mentioned in the will; and to the extent to which those expressed purposes have failed; that is, as to any part of the property in respect of which no intention of the testator is expressed, the law is to determine to whom it belongs; and the two sorts of estate being blended, each contributing, in proportion, to fulfil the purposes which can be accomplished, the share of residue which has lapsed must be deemed to consist of proportionate parts of the two sorts of estate; and that being so, the proportion of the lapsed share of residue which consists of the produce of real estate, having been directed to be converted for a purpose which is disappointed, belongs to the heir." *Salt v. Chatterway*, 3 Beav. 576, 578.

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sequent part of his will, the testator again mentions all his property as being personal at the end of twelve months after his decease. I think that the expression "out of my personal estate" means out of the common mass of his property at the end of twelve months, composed of pure personalty, and the converted realty, and that the legacy of 600*l.* must be considered as payable out of the mixed fund; the consequence is, that this charitable legacy will fail in the same proportion as the other charitable gifts.[1]

With respect to the costs, it is the usual course to direct the different parts of the fund to bear, *pro rata*, the costs of the suit.

LEVY V. PENDERGRASS.

1840: February 21.

By the general turnpike act, the trustees are empowered to let the tolls by auction; but amongst other provisions to prevent undue preference, a minute glass is to be turned thrice after each bidding; and it declares, that if no other person bids, the last bidder is to be the farmer or renter. Trustees under this act put up tolls subject to other conditions, one of which was, that unless there should be three biddings there should be no letting, unless the trustees thought proper to take less than three biddings, and that the trustees should have a reserved bidding. There was one bidding only, which was made by the plaintiff; whereupon the trustees declared, that if there was no advance, they should be obliged to make a reserved bidding. The minute glass was turned thrice, and there was no further bidding. The plaintiff insisted that under the express terms of the act, he was the purchaser, and he filed his bill for a specific performance: Held, that he was not entitled to relief, and the bill was dismissed, but without costs.

UNDER the general turnpike act, 3 G. 4, c. 126, s. 55, the trustees and commissioners of turnpike roads are empowered to let the tolls; and it enacts, that "whenever any tolls shall be let under the powers given [*416] by that or any other act of Parliament, the directions following shall be observed: the trustees are to give public notice, and advertise certain particulars as to the intended sale; "and to prevent fraud, or any undue preference in letting thereof," they are to provide a minute glass, and immediately after every bidding the glass shall be turned, and as soon as the sand is run out it shall be turned again, and so for three times, unless some other bidding intervenes; and if no other person shall bid until the sand shall have run through the glass three times, the last bidder shall be the farmer or renter of the said tolls.

The tolls for one year of the gates near Hereford were put up for sale by auction on the 1st of June, 1836.

Previously to their being put up, certain conditions for the letting the tolls were produced, and read aloud by the clerk of the trustees to the persons then present, and one of such conditions was, that unless there should be three or more biddings there should be no letting, unless the trustees present thought

[1] As to gifts void by the statute of mortmain, see farther, *Baker v. Sutton*, 1 Keen, 224. *Attorney General v. Ackland*, 1 R. & M. 243.

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proper to take less than three biddings. Another of the conditions was partly as follows:—the trustees reserve to themselves the liberty of bidding once for the said tolls, &c., by Mr. Bell, their clerk.

The plaintiff attended the sale, the tolls were put up at 5274l., and the plaintiff bid 25l. upon this sum. No other person appearing to bid more for the tolls, the defendant, Mr. Pendergrass, who was a trustee and chairman on the occasion, repeatedly told the plaintiff that if there was no advance on the said bidding, he should be obliged to make a reserved bidding. The [*417] *minute glass was turned thrice without any other bidding having been made for the tolls. The commissioners insisted that this was no sale, and afterwards let the tolls for a year to the defendant Bennett for 5951l.

The plaintiff, after some correspondence, filed his bill on the 29th of September, 1836, against Mr. Pendergrass the trustee, and Bennett the lessee, for the specific performance of the agreement: for an account of the tolls collected by the trustees or Bennett during the period, for a receiver, and for an injunction.

The defendants by their answer stated the above circumstances, and submitted that the declaration so made by the defendant Pendergrass to the plaintiff was equivalent to a bidding for the said tolls according to the reservation in the said condition.

The plaintiff, *without replying to the answer*, brought the cause on for hearing.

Mr. *Pemberton* and Mr. *Jemmett*, for the plaintiff, contended, that according to the strict terms of the act the plaintiff was the contractor; that he was not aware of the special conditions, which, under the terms of the act, were wholly invalid and inoperative, as by such means the trustees reserved to themselves the power of rejecting an offer, and of giving a preference contrary to the express terms and spirit of the act of Parliament. That public trustees were bound to pursue strictly the powers given them by the legislature;

Pearse v. Morrice.(a) That if the conditions were valid, then that [*418] the chairman, waiving the three biddings, put the *case entirely on the reserved bidding only, which had never been made by Bell.

That the expiration of the term was not an obstacle to the specific performance of this agreement by taking an account of the profits, it was so decided in *Wilkinson v. Torkington*,(b) and lately in *Munday v. Jolliffe*,(c) and in *Nelson v. Bridges*.(d) They also cited *Denton v. Stewart*.(e)

Mr. *Kindersley* and Mr. *Wilbraham*, contra, contended that the proper remedy for the plaintiff was by action at law for damages, and not by suit in equity; and that now the term had expired, no relief could be given in this court. That the sale had taken place expressly under the conditions, and that the plaintiff was bound by them. That as the trustees had never ex-

(a) 2 Ad. & E. 84.

(b) 2 Y. & Col. 726.

(c) L. C. Dec. 24th, 1839

(d) Ante, p. 239.

(e) 1 Cox, 258.

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pressed that they thought proper to take less than three biddings, there had been no sale to the plaintiff. They urged also as an objection, the *laches* of which the plaintiff had been guilty.

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS :—The case depends entirely on the statements in the answer, and the construction of the act of Parliament, for the answer not having been replied to, every statement in it must be taken to be true. The act prescribes a certain mode of proceeding in letting the tolls, and according to the strict directions of the act, if nothing else had occurred, I think that the plaintiff would have been entitled to the tolls ; for the glass having been *turned three times, the act of Parliament says [*419] that at that moment the person who bid last is to be the contractor.

The answer, however, states, and the statement must be taken as true, that the sale took place subject to certain special conditions, which were read previously to the sale ; one of these conditions was, that unless there were three or more biddings there should be no letting, and the other that the trustees reserved to themselves the right of bidding once. The biddings commenced ; now how many bidders there would be, could not be ascertained until the time expired, and the glass had been turned thrice, but this being done, then came the question whether turning down the glass determined the sale, or that there had been only one bidding. The trustees, it appears, never announced that they accepted less than three biddings according to the condition of sale, then did the act of Parliament defeat the condition on which the whole had taken place, the pleadings admitting that the plaintiff made the bidding on the understanding, that there was to be no letting, if there were not three biddings, unless the trustees thought proper to take less ? It is certainly singular that the trustees did not declare that there had not been three biddings, which would have been a simple mode of showing what had been done ; but instead of doing this, they said that if no advance were made, they would be obliged to make a reserved bidding by their clerk, which, under the conditions, they had a right to do before the glass had been turned down.

It appears to me, on the whole, that the defendants have acted inconsiderately ; but according to the conditions on which the plaintiff admits the whole to have taken place, I think there was not a letting ; at the same time the plaintiff might have reason to think himself misled, *and under [*420] these circumstances there can be no specific performance, or any other relief, but I think the bill must be dismissed without costs.(a)

(a) The objection, under sect. 147, that this suit was brought after the expiration of three months, was not taken.

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THE ATTORNEY GENERAL V. KERR.

1840: March 14, 16, 31.

Absolute alienation and a reversionary lease of charity property set aside, as improvident.**Valid lease of charity property, which had merged in the fee by an invalid absolute conveyance to the lessee, sustained on setting aside the latter on an information by the Attorney General.****A lessee of charity property obtained a further reversionary term, and afterwards made considerable lasting improvements on the property; the reversionary lease being set aside, the court considered the lessee entitled to compensation for money laid out by him in reference to the extended enjoyment.****Municipal corporations, as altered by the municipal corporation act, (5 & 6 W 4, c. 76,) are but a continuance of the old corporations; and where the new corporation was made party to a suit, in respect of a breach of trust committed by their predecessors, it was held they were not entitled to costs.**

THE object of this information was to set aside an absolute conveyance and two reversionary leases, which had been made by trustees of charity property.

It appeared that the corporation of Northampton was possessed of property containing about one acre and a quarter, in that town, under the will of a testator, dated in 1683, by which he had devoted it "to and for the use and yearly benefit of the poor people of St. Thomas' Hospital, in the said town of Northampton, for ever," of which hospital the corporation were trustees.

In 1745 the corporation had granted a lease of the property for a term of twenty-one years, at a rent of 8*l*.

[*421] *In 1763, before the expiration of the former lease, they granted a reversionary lease of the same property to the same lessee, for a term of twenty-one years, commencing from 1766, at a rent of 8*l*., and a fine of 25*l*.

In 1769, at which time eighteen years of the second lease of 1763 were unexpired, the corporation granted to Dodd, the then lessee, a reversionary lease of the same property for sixty years, to commence in 1787, for the further term of sixty years, at the yearly rent of 9*l*., and Dodd covenanted to take down the present messuage and rebuild one or more substantial dwelling houses, and keep them in repair.

On the 10th December, 1784, the residue of the two terms created by the indentures of 1763, and 1769, were, in consideration of 241*l*., and with the license of the corporation, assigned to Dr. Kerr.

On the 18th December, 1784, the corporation granted to Dr. Kerr a further reversionary lease of the property for a term of thirty-nine years, to commence at Michaelmas 1847, at the yearly rent of 18*l*., and Dr. Kerr covenanted to build one or more good and substantial messuages or tenements, with convenient out offices, on some part of the said demised ground, and thereon to lay out and expend the sum of 500*l*.; and in case he should take down the building then being thereon, that in such case, he would, instead thereof, erect and build one or more good and substantial messuages, with convenient out offices thereto, or on some part of the said demised premises, and therein lay out

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and expend the sum of 1000*l.*, and afterwards keep the said erections and buildings in good and tenantable repair.

*At the time of granting this lease there was a term of sixty-two [*422] years and three quarters unexpired of the old leases, and which, being added to the new reversionary term of thirty-nine years, made a period of 101 years and three quarters. Dr. Kerr, having obtained these leases, laid out considerable sums on the property, and, by indenture reciting that Dr. Kerr had laid out more than 500*l.*, and that the corporation were convinced that it was for the benefit of the charity, the corporation, in consideration of the surrender of the two last leases, and of the fee-farm rent reserved, conveyed the property absolutely to Dr. Kerr, subject to a clear yearly fee farm rent of 12*l.*, and a fine of 10*s.*, at the end of twenty-one years for ever, and the corporation covenanted for quite enjoyment.

In these various transactions the parties had notice that the property belonged to a charity.

The defendant Osborne was the warden of the hospital, appointed by the old corporation. Under the municipal corporation act (5 & 6 W. 4, c. 76,) the old corporation was changed, and by the same act (a) charitable and trust estates vested in the corporation were to continue vested in the persons, who, at the time of the passing of the act, were trustees, until the 1st of August, 1836, or until Parliament should otherwise direct; and in default of any such direction before the 1st of August, 1836, the Lord Chancellor was empowered to make such orders as he should see fit for the administration of such trust estates.

This information was filed against the representatives of Dr. Kerr, the new corporation of Northampton, and Osborne, insisting that the reversionary leases were improvident, and ought to be set aside, and that the absolute conveyance to Dr. Kerr was invalid, and it insisted that the [*423] present corporation was liable for the defaults of the old.

Evidence was entered into in support of the information to show, from the facts stated in the above documents, and from the present value of the property, the improvidence in the mode which had been adopted of dealing with this trust property, and the loss which the charity had sustained. The present value of the property was estimated at about 6700*l.* On the other hand, the evidence on the part of the representatives of Dr. Kerr showed that when he took possession the property consisted of an irregular piece of ground, formerly a gravel pit, of very little value; that he had filled it up, built a handsome residence, with stables, hot-house, gardens, &c., and had expended upwards of 5000*l.* thereon.

It appeared also that the value of property in the towu had of late very considerably increased, in consequence of the increase of the population.

Mr. *Pemberton*, Mr. *G. Richards*, and Mr. *O. Anderdon*, in support of the

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information, contended that the alienation of the fee simple of a charity estate could not be supported on any principle; that it was a breach of trust on the part of the trustees, of which the purchaser had notice, and that it must therefore be set aside *in toto*; that there would then be no necessity for setting aside the leases, as they had merged at law, and no bill had been filed by the representatives of Dr. Kerr to set them up, besides which, the leases themselves, were, as they contended, invalid. They were, in the first place, granted in reversion, a course quite inconsistent with a provident dealing with trust property; they were, besides, of an extreme length, the [*424] extent of *the two terms, in 1784, being more than 100 years. In *The Attorney General v. Lord Hotham*(a) it was held that a ninety-nine years' lease of charity property, at an uniform rent, could not stand, unless some satisfactory reason could be given to support it: that here none existed, and it was shown by the evidence that, in this transaction, the charity had not obtained the full value of the property: that it was a repairing, and not a building lease, and the trustees had no authority to grant such leases.

Mr. Kindersley, Mr. G. Turner, Mr. D. James, Mr. B. Parry, Mr. L. Wigram, Mr. Stuart, Mr. Keene, Mr. Bacon, and Mr. Jeremy, contended that there was no positive rule which rendered the alienation of charity property invalid. In *The Attorney General v. Warren*,(b) Sir Thomas Plumer stated the law in these terms:—"The principle that governs all the cases is this, that trustees are bound to a provident administration of the fund for the benefit of the charity. There is no positive law which says that in no instance shall there be an absolute alienation; if so, even in the case of an inquiry under an order of the court, whether alienation would be beneficial to the charity, being contrary to law, it could not be good; but on many occasions, by the authority of the court, alienation has taken place, as in the case mentioned of a decayed house, in which, after a reference to the Master to inquire whether it was for the interest of the charity, the court directed it to be disposed of. If, contrary to law, the court could not authorize the disposition, alienation under the authority of the court would be as invalid as without it. These decisions, therefore, afford a conclusive proof that [*425] alienation, not *improvident, but beneficial to the charity, and conformable to the rule which ought to guide the trustees, may be good, and disclose the principle on which any bill to rescind that alienation must proceed." So in *The Attorney General v. Hungerford*,(c) a lease renewable for ever of charity lands, at a fixed rent, which amounted in effect to an alienation of the inheritance, was supported. There Lord Brougham recognized as law the principle that charity property might, in a proper case, be aliened. He says, "I am not sure that it is law founded either upon principle, on sta-

(a) 1 Turn. & Russ. 216. [Affirmed by Lord Eldon, 3 Russ. 415.]

(b) 2 Swan. 302.

(c) 8 Bl. 437, and 2 Cl. & Fin. 357.

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tute, or on authority, to lay down the proposition that all leases such as this,—that all perpetuities such as this,—even that alienations, if it can be said that this lease amounts to an alienation, are therefore, as such, void or voidable. 'There is no warrant of principle for that ; each case must depend upon its peculiar circumstances ; I put the case where even an alienation might be fit, not only justifiable, not only harmless, as regards the breach of trust or abuse of trust by the trustees, but might be a fit course for them to adopt." And, after putting a case in which an alienation would be manifestly for the benefit of a charity, he adds, " I go further, and state, that in the case I have supposed, the trustees would have been guilty of an abuse of trust if they had hesitated to part with the land upon these terms, and that an information at the suit of His Majesty's Attorney General, or of any relator, might well have been maintained against them, to compel them to do that which was for the real benefit of the charity." They also contended that the circumstances of this case justified the alienation, subject to the fixed rent.

As regarded the leases, they urged that the fact of their being reversionary, and for a long term, was not *sufficient to invalidate [*426] them ; that some fraud must be proved, and that it must be shown that no persons meaning fairly to discharge their trusts, would have resorted to that mode of letting. In *The Attorney General v. Cross*,^(a) Sir W. Grant, speaking of a lease for ninety-nine years, determinable on lives, said, " I am not aware of any principle or authority on which it can be held that such a lease is, on the very face of it, an abuse of trust." They argued that the state of the property, as shown by the evidence, was sufficient to show that the transaction was provident, and such as any prudent man would have adopted in the case of his own property, and that valuations made after so great a lapse of time, and after a fortuitous increase in the value of property in the town, could not be relied on. That if the leases had merged, still, as the legal estate was in the defendants, the court, if it set aside the conveyance, would not deprive them of the whole legal interest, so as to defeat the leases ; and, lastly, that if the transaction were set aside, the defendants ought to be allowed for the amount of their outlay and improvements on the property.

They argued, also, that the great lapse of time, if not a bar, ought yet to influence the court favorably towards the defendants ; *Attorney General v. Caius College*,^(b) *Attorney General v. Pembroke Hall*,^(c) *Attorney General v. Backhouse* ;^(d) and cited *Re Skinner*^(e) to show that it was not the opinion of the court "that a tenant who has got a lease of a charity estate at too low a rate with reference to the actual value, is therefore to be turned out, if it appears that he has himself acted fairly and honestly ;" and that the case of a charity estate "is one in which, of all others, the security of the rent is the first object to be regarded, and, therefore, in such cases, the inadequacy

^(a) 3 Merivale, 559.^(b) 2 Keen, 150.^(c) 2 S. & St. 441. [S. C. 1 Russ. & M. 751.]^(d) 17 Ves. 283.^(e) 2 Mer. 457.

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[*427] of the rent reserved is less a "badge of fraud than it would be in almost any other instance."

Mr. *K. Parker*, for Osborn.

Mr. *Tinney* and Mr. *Hardy*, for the present corporation of Northampton, contended that if the leases were to be set aside, they must be cancelled *in toto*, without leaving the covenants of the corporation in force for the benefit of the lessee, *Attorney General v. Morgan*;(a) and further, that the present corporation was not in the position of their predecessors to the extent of rendering them liable for the breaches of trust of the old corporation, and that the liability for any defaults of the former corporation, did not attach as a lien on the corporate property. They cited the *Attorney General v. The Corporation of Exeter*;(b) *Attorney General v. The Corporation of East Retford*;(c)

Mr. *Bethell* and Mr. *Whitworth*, for the new trustees of the charity, who had been brought before the court by supplemental bill.

Mr. *Pemberton* in reply :—If the leases have merged in the void conveyance, the *onus* is on the defendants to show an equity to re-establish them.

THE MASTER OF THE ROLLS :—With respect to the conveyance of the fee, and notwithstanding the evidence which has been gone into, it appears to me, and it seems to have been felt by those who have so ably argued this case, that it would be "utterly irreconcilable with every principle on which charity property can be advantageously dealt with to allow such a transaction as this to stand. It has been truly said, that when a considerable benefit would be gained to a charity, the Court itself would order an alienation of charity property ;[1] and from this it is argued that on clear and decided evidence of its being manifestly for the benefit of the charity, a trustee might be justified in doing that which under similar circumstances the court itself would do ; such cases have certainly from time to time been put, but this is not one of such cases. I apprehend that there

(a) 2 Russ. 306.

(b) 3 Russ. 395.

(c) 2 Myl. & K. 39, and 3 Myl. & Cr. 484.

[1] But this should only be allowed under very special circumstances. *Attorney General v. Mayor, &c., of Newark-upon-Trent*, 1 Hare, 395. In that case, Wigram, V. C., said : "It was said in argument, that the court had clearly power to direct the sale of the lands of a charity. I do not doubt the existence of this power in the court.—The question is not upon the existence of the power, but whether the court would be right in exercising such a power.—Now the only case which I have known in my own practice, where this was actually done, was that of the *Attorney General v. Nethercoat*, [not reported.] There the court ordered the charity estate at South Molton, or a great part of it, to be sold, and the consequence was, that fourteen cottages were sold in fourteen lots. The same number of abstracts were delivered to the purchasers, and the expense of the sale nearly swallowed up the purchase money. I am informed that the charity has wholly disappeared. The lands have passed into the hands of the purchasers, and the money is gone. That case is, at least, a caution against selling charity lands under the notion of benefitting the charity, except under very special circumstances." As to cases in which a sale, or what is equivalent, long leases, have been or may be sustained, see *ibid.* 401, 402, 403.

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can be no doubt whatever in any ordinary mind, that the last transaction here complained of must be set aside.

That being so, then arises the question, whether the former transactions ought to be sustained. As to granting leases of charity property, it is certainly a strong proposition to lay down, that the trustees of a charity have the same powers which a prudent owner has with respect to his own property: there may perhaps be *dicta* which go almost to that extent, but I apprehend that much more is expected from trustees acting for a permanent charity, than can be expected from the ordinary prudence of a man in dealings between himself and other persons. A man acting for himself may indulge his own caprices, and consider what is convenient or agreeable to himself, as well as what is strictly prudent, and his prudential motives cannot afterwards be separated from the others which may have governed him. Trustees of a charity within the limits of their authority, whatever they may be, should be guided only by a desire to promote the lasting interest of the charity.[1]

Without entering into the question upon whom the *onus* of proof lies in such a case as this, I must say, that on looking into these transactions, and having regard to their nature, and the evidence as to the [*429] state and value of the property at the time, I am not satisfied that the lease of 1769 was an imprudent transaction, and therefore I do not think that I can set it aside.

With respect to the lease of 1784, looking again at the evidence of the value so long ago as the year 1763, at the length of the lease then subsisting and unexpired, and considering that it could not by possibility be prudent or advantageous to the charity, to add to that long reversionary term of sixty-two years and three quarters already existing, a further reversionary term of thirty-nine years, and having regard to the covenant contained in that lease, I do not think that it is a lease which can be sustained. I must set aside the conveyance of 1791, and the lease of 1784, but not disturb the lease of 1769.

[2] Lord Brougham uses language somewhat less stern than the above. He says, (*The Attorney General v. Mayor, &c., of Newbury*, 3 Myl. & K. 647, 650, 651,) "It is unquestionable, that where trustees of a charity have, through real mistake, and without any corrupt motive, misapplied the funds under their care, their conduct will be considered with a lenient disposition, if not in a favorable light; and that they will not be visited as if they had knowingly and wilfully divested the fund from its proper uses. This has often been laid down in the cases before the court.—The circumstance of the trustees being a corporate body, should certainly rather increase the disposition towards a lenient construction of their proceedings; and, although in contemplation of law, the identity of the body is preserved through ages, yet misdeeds alleged to have been committed long ago are only to be visited upon those of the present generation, when there exists no doubt of the misfeasance. In point of law, the body is precisely one and the same; but no strictness of legal principle can prevent us from at least exacting very clear proof of a case, when in point of fact, parties between whom there subsists but a slender kind of privity, are made answerable for each other's acts. On the other hand, we must be careful not to admit any relaxation of principle which would open the door to boundless abuse, and especially in bodies from their very nature so prone to all kinds of negligence and misconduct. Such a door would assuredly be flung open were the court to hold that nothing short of corruption could fix a corporation with the consequences of acts done in old time," &c.

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The charity having equity, must on its part do equity.[3] and the question is, what ought to be done with regard to the very great and valuable expenditure which has been made? If it has been made with reference only to the enjoyment under the existing lease of 1769, nothing will be due; but if it has been made, not only with reference to the beneficial enjoyment under the first lease, but in consequence of the extension of the lease in 1784, then I think, it would be no more than just and reasonable towards the estate of Dr. Kerr, that some compensation should be made to him in that respect. Some inquiry must be had for the purpose of ascertaining (if it be susceptible of ascertainment) what, if anything, has been laid out with reference to the extended enjoyment which Dr. Kerr was led by the corporation to suppose he was entitled to, and which he would not otherwise have laid out; but no ornamental expenditure can be allowed.[4]

[3] "There are many cases in which this court will not interfere with a right which the possession of a legal title gives, although the effect be directly opposed to its own principles as administered between parties having equitable interests only, such is in cases of subsequent incumbrancers without notice gaining a preference over a prior incumbrance by procuring the legal estate. It is to be regretted, that the rights of property should thus depend upon accident and be decided upon, not according to any merits, but upon grounds purely technical, this, however, has arisen from the jurisdiction of law and equity being separate, and from the rules of equity, (better adopted than the simplicity of the common law to the complicated transactions of the present state of society,) though applied to subjects without its own exclusive jurisdiction, not having, in many cases, been extended to control matters properly subject to the jurisdiction of the courts of common law. Hence arises the extensive and beneficial rule of this court, *that he who asks for equity must do equity*, that is, this court refuses its aid to give to the plaintiff what the law would give him, if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the conditions should be one, which this court would not otherwise enforce." Lord Cottenham, *Sturgis v. Champneys*, 5 Myl. & Cr. 161. And see *Buchanan v. Upshaw*, 1 Howard, 84. *Clark v. Flint*, 22 Pick. 241. *Bright v. Boyd*, 1 Story's Rep. 494, 495. See also next note.

[4] Vide *Trevelyan v. White*, 1 Beav. 588. *Green v. Winter*, 1 Johns. Ch. Rep. 27. The question whether a *bona fide* purchaser, who has made improvements upon land from which he is afterwards evicted, could proceed *actively*, to obtain compensation for those improvements, was considered by Mr. J. Story, without however distinctly deciding the point, in *Bright v. Boyd*, 1 Story's Rep. 478. He says, (p. 495,) "It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title perfectly apparent and complete; is it reasonable or just, that in such a case, the true owner should recover and possess the whole, without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable, thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is, that the moment the house is built, it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection; but merely and dryly stating, that the law so holds. But then, admitting this to be so, does it not afford a strong ground why equity should interpose, and grant relief?—I have ventured to suggest, that the claim of the *bona fide* purchaser,

 1840.—Attorney General v. Kerr.

I cannot give the corporation any costs. I consider it to be a continuing corporation : though it is very *common to designate the corporation in its old state, and its new state, as the old corporation and the new corporation, yet for the purposes here in question there is no distinction between them. It is the same corporation under a new government. The act of this corporation having rendered these proceedings necessary, I cannot give them their costs.[5]

under such circumstances, is founded in equity. I think it is founded in the highest equity ; and in this view of the matter, I am supported by the positive dictates of the Roman law, &c." Where a party seeks to enforce a right, which he can only obtain through the intervention of a Court of Equity, the court grants him relief upon the terms it chooses to impose ; but very different considerations arise where one party seeks to deprive another of rights and privileges with which the law has invested him. So, speaking to this very point, the claim of an evicted purchaser for compensation for improvements, Walworth, Ch. says ; " This principle of natural equity [i. e. the right to compensation] is constantly acted upon in this court where the legal title is in the person who has made the improvements in good faith, and where the equitable title is in another who is obliged to resort to this court for relief. The court in such cases acts upon the principle that the party who comes here as a complainant, to ask equity, must himself be willing to do what is equitable. I have not, however, been able to find any case, either in this country, or in England, wherein the Court of Chancery has assumed jurisdiction to give relief to a complainant, who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud or acquiescence, on the part of the latter, after he had knowledge of his legal rights. I do not, therefore, feel myself authorized to introduce a new principle into the law of this court, without the sanction of the legislature, which principle, in its application to future cases, might be productive of more injury than benefit." *Putnam v. Ritchie*, 6 Paige, 404, 405. The reader is left to determine between the opinions, somewhat discordant, of two of our most learned judges,—the latter, however, being a *res judicata*. Although the strict rule maintained by the Chancellor of New York may, in many instances, work extreme hardship, yet in the main, it seems most conducive to public convenience. It may well be, that the rightful owner would be deterred from asserting his claims, in consequence of the obligation to pay for costly erections on his land ; besides, it is the duty of the purchaser thoroughly to investigate the title he receives ; and he has a right to secure himself by proper covenants from his grantor. Mr. Chancellor Kent, ably sustains the view of the subject taken by his successor. 2 Kent's Com. 334—338.

[5] " It is of no consequence that the individuals now sustaining the corporate character enjoying the immunities, and exercising the functions of the corporation, are wholly different from those who did the wrong, or who permitted the neglect, and are only connected with them through the medium of a common municipal character. This is the condition inseparably annexed to their corporate character ; and the individuality of the body politic, with all its incidents, is thus maintained as perfectly in the system of jurisprudence, as the identity of the natural body is preserved entire in the system of the world." Lord Brougham ; *The Attorney General v The Mayor &c. of Newbury*, 3 Myl. & K. 654. See further as to the alienation of charity lands, and the rights and liabilities of trustees, 3 Russ. 397, n. 1. 1 Russ. & M. 751, n. 1. 2 Keen, 168, n. 1. *Attorney General v. Brettingham*, 3 Beav. 91.

1839.—*Pride v. Fooks.**PRIDE v. FOOKS.*

1839: November 22. 1840: March 2.

A trustee who was directed by the will of the testator to invest the residue in consols, and to accumulate the dividends, invested it on mortgage of real estate: he was held liable to make good the amount of stock which would have been purchased in consols, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock.

A trustee guilty of a breach of trust, allowed the general costs of an administration suit as between solicitor and client, but was ordered to pay so much as had been occasioned by his breach of trust.

Property was directed to be accumulated for such children as A., B., and C. should leave at their deaths; with power to the trustee to apply such part of the income, as in his judgment might be proper, for their education and maintenance during their minority, and for their future advancement in life. Held, as to a daughter of C., that the power for maintenance did not cease on her marriage, but that it ceased on her attaining twenty-one: and as to the power of advancement that it continued, notwithstanding she had attained twenty-one and had married, and notwithstanding the period for accumulation limited by the Thellusson act had expired.

THE testator Thomas Webb by his will, dated in 1805, after certain devises and bequests, gave and devised all his freehold and personal estate, and the sum of 7000*l.* stock in the 3 per cent. consolidated annuities, to the defendant Thomas Fooks upon trust, with all convenient speed, to sell his estates, and after payment of his debts, funeral expenses, and legacies, in trust to place and invest all the residue in the name of Thomas Fooks in 3 per cent. consolidated annuities, in addition to the said stock of 7000*l.* already there, and the testator directed that Thomas Fooks should from time to time receive the interest or dividends arising from the whole of such funded

[*431] *property, and after paying and discharging the several annuities thereinbefore bequeathed, invest, and place the residue of such dividends and interests in the name of the said Thomas Fooks in the said 3 per cent. annuities in augmentation as well of the said stock of 7000*l.* already there, as of the addition or accumulation from time to time to be made there-to, by and out of the said trust estate, which the testator directed should continue to be increased in such manner, and remain vested in Thomas Fooks, in trust for and for the only benefit of such child or children as his nephews and niece Walter, Thomas, and Dorothy should leave at the time of their respective deceases, and to be paid and divided as follows, that is to say, one-third part thereof to the child or children of the said Walter Pride, and if but one child only, then the whole to such only child, but if more than one, then unto all such children in equal proportions, and the two remaining third parts thereof to the child or children of the said Thomas and Dorothy in like manner; and in case either of his nephews and niece should happen to die without leaving any children or a child lawfully begotten, then he directed that such third part should go and be paid to the children or child of the other or others leaving children or a child in equal proportions, if more than one. And in case all his said nephews and niece should happen to die without leaving

1839.—Pride v. Fooks.

any issue lawfully begotten, then he directed that the whole residue of his said estates should go and be paid to the three children of Peter Gapper deceased, by Jane his wife, in equal shares and proportions. And the testator authorized the said Thomas Fooks from time to time "to apply so much and such part of the income of his said estate as in his judgment might be sufficient and proper, *for the education and maintenance of the children of his nephews and niece during their minority, and for their future advancement in life.*"

"The will contained the usual trustee clauses, that he should only [*432] be accountable for losses happening through his wilful neglect and misconduct, and that he might reimburse himself all costs, charges, and expenses.

The testator died on the 17th of December, 1808, and Fooks, who proved his will, received in March, 1810, a sum of 6275*l.* which he invested on a mortgage of real estates. By this bill which was filed by Walter Pride (since dead) and Dorothy Worsdale, it was sought to charge the defendant Fooks with a breach of trust in thus investing the fund, instead of laying it out in consols, pursuant to the trusts of the will, and to make him responsible for such a sum as would have been produced, if the fund had been properly invested, and the dividends accumulated; the bill also prayed that the interest of all parties in the residue might be declared, and that the usual accounts might be taken.

The only children of the testator's nephews and niece were the two daughters of Dorothy, namely, Elizabeth Anne, who was born in October, 1799, and married Francis Cottle in January, 1819, and died in 1827, leaving three children; and Caroline Frances, who was born in January, 1811, and married George Fowler in June, 1829. To these daughters and their families the trustee had made advances as after stated.

When the case came on in July, 1835, it was declared, that the accumulations ought to have ceased on the 17th of December, 1829; and as to the breach of trust it was declared that the 6275*l.* received by Fooks in March, 1810, ought to have been invested in consols according to the trusts of the testator's will, and it was referred to the Master to inquire what sum of 3*l.* per cent. annuities, according to the market price, might have been "purchased with the 6275*l.* on that day, and what sum of stock [*433] would have arisen from the accumulations of the dividends of such stock from the 25th day of March, 1810, to the 17th of December, 1829, if the same had been accumulated pursuant to the trusts of the testator's will; and it was declared that the defendant Fooks was bound to make good the same. The Master was also directed to inquire, what sums had been paid or allowed by Fooks for the maintenance, education, or advancement in life of the respective children of the testator's nephews and niece.

The Master by his report, dated the 12th of July, 1838, found that the sum of 6275*l.* would have purchased 9110*l.* 3 per cent. consols on the 26th of

 1839.—*Pride v. Fooks*.

March, 1810; and that 10,510*l.* 3 per cent. consols would have arisen from the accumulation of the dividends on the 9110*l.* 3 per cent. consols from the 26th of March, 1810, to the 17th of December, 1829, if the same had been accumulated.

As to the maintenance and advancements he found the circumstances hereinafter stated. It appeared also from the accounts, that Fooks had from 1809 to 1834, retained balances of the trust moneys in his hands, varying from 2600*l.* downwards.

The cause now came on for further directions, and at this time both the nephews had died, without leaving any children.

The questions which now arose were as follows:—

First, as to whom the accumulations of the trust fund, subsequent to December, 1829, (being twenty-one years from the testator's death,) belonged, such *subsequent accumulations being void under the *Thelusson act*.(a)

The *second* question arose, under the power of maintenance and advancement, out of the following circumstances which appeared upon the Master's report:—

On the marriage of Mrs. Cottle, the daughter of the testator's neice Dorothy, which took place in January, 1819, a settlement was made. The husband was a schoolmaster, and, not succeeding in his profession, the trustee, at the request of the plaintiffs Walter Pride and Dorothy Worsdale, was induced to make various advances, to the amount, in the whole, of 650*l.*, for the maintenance of Mrs. Cottle and her family; at what times the several sums constituting this aggregate amount were advanced did not appear; but Mrs. Cottle, having been born in October, 1799, and married in January, 1819, she was then only nineteen years old, and some of the sums may have been advanced before and others after she attained twenty-one years of age. The allowance of any part of these advances of 650*l.* to Mrs. Cottle and her family was objected to.

Mrs. Cottle died on the 30th of April, 1827, leaving issue three children, and leaving her husband in poor circumstances; and the trustee, Mr. Fooks, after her death, advanced to her surviving husband 50*l.* a year for the five following years, to enable him to support the three children, the issue of the marriage. The allowance of this sum was objected to by those who might become entitled to the fund in the events provided by the will.

Mrs. Fowler, the other daughter of the testator's neice Dorothy, [*435] married in June, 1829, when she was between *eighteen and nineteen years of age. She married without the advice or knowledge of the trustee, and no settlement was made upon her; but her husband being in very humble circumstances, and unable to maintain her, the allowance which had been previously made for maintenance was continued for her.

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The husband having no house or place of residence, the payments on this account were actually made to the mother Dorothy Worsdale, but on account of the daughter, and for her maintenance. They amounted in the whole to 196*l.* 13*s.* 4*d.*, and were continued from the time of the marriage in June, 1829, till the end of the year 1833. Mrs. Fowler attained her age of twenty-one years on the 2d of January, 1832. Although no settlement was made on Mrs. Fowler's marriage, it appeared that after the marriage, Mr. Fooks, the trustee, advanced to Mrs. Fowler the sum of 67*l.* 8*s.* 7*d.*, to provide her with things necessary by way of outfit. These advances to Mrs. Fowler were also objected to.

Mr. *Kindersley* and Mr. *B. S. Follett*, for the plaintiffs, contended that the next of kin were entitled to the income arising and which might arise from the property subsequent to the 17th of December, 1829, until the property became distributable: *McDonald v. Bryce*,^(a) *Eyre v. Marsden*;^(b) and they insisted that the defendant Fooks ought to account for the balances which had remained in his hands, with interest at 5 per cent.; *Turner v. Turner*.^(c)

They contended also that the payments made by Mr. Fooks, after the marriages of Mrs. Cottle and Mrs. Fowler, were not authorized [*436] by the power and ought not to be allowed, as after their marriages their husbands became legally bound to maintain them. They also argued, that the payments to Mr. Cottle and his children, subsequently to his wife's death ought to be disallowed; and that the power of advancement ceased on her marriage, or, at least, at the time when under the Thellusson act, the income was given to the next of kin; they likewise insisted that Fooks ought to bear the costs of the suit rendered necessary by his misconduct, and that the extra costs ought to be paid out of the general estate, according to the decision of the Lord Chancellor in *Eyre v. Marsden*.^(d)

Mr. *Tinney* for the representatives of the widow, and

Mr. *Bethell*, for the representatives of one of the next of kin contended that the next of kin were entitled to the dividends of the sum which would have been produced if the money had been properly invested in the funds, and consisted on the 17th of December, 1829, of 19,620*l.* consols.

Mr. *Pemberton*, and Mr. *G. Turner*, for Mrs. Fowler, contended that the power for maintenance alone was limited to the minority of the objects, and did not cease on the marriage of Mrs. Fowler, and that the power of advancement continued after her majority and was not determined by her marriage. They asked a reference to the Master, to approve of a proper sum to be allowed for her future advancement. They cited *McDermott v. Kealy*.^(e)

Mr. *Cooper* for Mr. Cottle.

*Mr. *Spence* and Mr. *G. Russell*, for Fooks, contended that the [*437] several advances had been properly and *bona fide* made, and ought

(a) 2 Keen, 276.

(b) Ib. 564.

(c) 1 Jac. & W. 99.

(d) 4 Myl. & Cr. 231.

(e) 3 Russ. 264, n.

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to be allowed to the trustee; that Fooks was not responsible to the next of kin, for whom he had not undertaken any trust; that interest on balances was by no means of course, and ought not to be allowed in this case, *Tebbs v. Carpenter*; (a) as to costs, they contended that Fooks ought not to pay the whole costs of the suit, which was for administering the estate, and for the benefit of all parties.

THE MASTER OF THE ROLLS considered the next of kin entitled to the income, subsequent to the time when the accumulations were forbidden by the Thelluson act; and that there ought to be an inquiry as to the balances from time to time in the hands of Fooks, and whether the same were required for the purposes of the trusts contained in the testator's will, with liberty for the Master to state special circumstances, and an inquiry as to what would have been produced from the accumulations if the balances had been properly invested. That Fooks was entitled to the general costs of suit as between solicitor and client, he paying so much as had been occasioned by his breach of trust. His Lordship reserved his decision on the other points.

1840: *March 2*.—THE MASTER OF THE ROLLS:—The questions reserved in this case were, first, whether the trustee was justified in paying any sums of money for the maintenance of Mrs. Cottle and Mrs. Fowler, after they attained the age of twenty-one years; secondly, whether the trustee was justified in paying any sums of money to Mr. Cottle for the maintenance of himself and the children of his deceased wife; and, thirdly, whether Mrs. Fowler, notwithstanding her marriage and the attainment of her age of twenty-one years, is entitled to any allowance or payment for her future advancement in life.

The testator, Mr. Webb, died on the 17th of December, 1808: he gave his residuary estate to Mr. Fooks, to be invested and accumulated, and directed that the accumulated fund should be vested in Mr. Fooks for such children as his nephews and neice should leave at their respective deceases, one-third part to go to the children of each nephew or neice; and, after providing for the events of all or any of his nephews or neice dying without leaving any child, he empowered the trustee from time to time to apply so much of the income of the estate as, in the judgment of the trustee, might be sufficient and proper for the education and maintenance of the children of the nephews and neice during their minority, *and for their future advancement in life*.

[His Lordship having stated the circumstances which had occurred subsequently to the testator's death, proceeded.] At what times the several sums constituting the aggregate amount of 650*l.* were advanced for the maintenance of Mrs. Cottle and her family, does not appear; but Mrs. Cottle was born in October, 1799, and married in January, 1819, so that she was then only nine-

(a) 1 Mad. 290.

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teen years old, and some of the sums may have been advanced before, and others after, she attained twenty-one years of age.

The allowance of any part is objected to, and I think, that as to such part as was advanced after October, 1820, when she came of age, the objection is good upon *the words of the will; but that, as to the sums [*439] advanced during the minority of Mrs. Cottle, although she was married, the same ought to be allowed to the trustee.

The allowance of 50*l.* a year, for the five years following the death of Mrs. Cottle, by the trustee to her surviving husband, to enable him to support the three children, is also objected to by those who may be entitled to the fund in the events provided by the will; and I am of opinion that the objection is well founded, and consequently that these sums, the payment of which is not authorized by the will, cannot be allowed to the trustee.

As to the allowance for maintenance, made by the trustee to Mrs. Fowler, I have already expressed my opinion that the payments up to the time when she came of age, ought to be allowed.

On considering the words of the will, it does not appear to me that the subsequent payments ought to be allowed; and I must therefore order the disallowance of so much of the sum of 176*l.* 13*s.* 4*d.* as was paid for or on account of the maintenance of Mrs. Fowler after the 2d day of January, 1832.

Although no settlement was made, it appears that after the marriage, Mr. Fooks, the trustee, advanced to Mrs. Fowler the sum of 67*l.* 8*s.* 7*d.* to provide her with things necessary by way of outfit; and I think that that sum may without impropriety be allowed as an advancement.

Finding myself under the necessity of disallowing these considerable sums to Mr. Fooks on passing his accounts, I think it right to observe that the payments, *though not made according to the authority which he [*440] possessed when strictly considered, appear to have all of them been honestly and *bona fide* made for the benefit of the objects of the testator's bounty; and at the request of their nearest relation: there is no doubt that he meant fairly and acted as he thought for the best, and did what was, in fact beneficial to the persons for whom the payments were made; and if this court could supply the want of authority under the will, this is a case in which it would be done.

But it is claimed for Mrs. Fowler that provision ought now to be made for her future advancement in life. The testator authorized the trustee to apply a sufficient part of the income for the maintenance of the children during their minority, and for their future advancement in life.

It is urged for Mrs. Fowler, that the words "future advancement in life" are not connected with the word "minority," so as to deprive the trustee of his power to apply the income for her future advancement in life, even after she has attained her majority.

On the other hand, it is contended that advancement, as well as maintenance, were intended to be allowed only during minority; that Mrs. Fowler,

 1840.—*Pride v. Fooks*.

on her marriage, ceased to be an object of the power; that the question of advancement was left to the direction of the trustee, who refuses to advance; and that, by the expiration of twenty-one years, there is no *subject* upon whom the power can operate.

It does not appear to me that, upon the construction of the will, the power of the trustee to apply part of the income for the future advancement [*441] in life of the *children, ceased with the minority of the children, or that, by the expiration of twenty-one years, there has ceased to be any subject for the power to operate upon. The act which prevents accumulations, applies only to that which was meant to be accumulated,—to the residue after the purposes which continue lawful are answered; not to any thing which it was within the duty or the legal competence of the trustee to do, as against the accumulation if the accumulation had been allowed to proceed: a great difference is indeed effected in the parties who are interested to oppose any application of the income would otherwise have accumulated, but no difference in the power or duty to apply the income in a mode directed by the will, which continues lawful.[1]

I do not find that in point of fact the trustee refuses to apply any part of the income to the future advancement in life of Mrs. Fowler; he declines, and necessarily under the circumstances, to act without the sanction of the court, but that is all; and I think that Mrs. Fowler is not to be prejudiced by this, if the case be proper for her relief.

The remaining point is, that upon the marriage she ceased to be an object of the power; and to be sure you cannot advance a woman who is already married by obtaining a marriage for her: she is precluded from any mode of future advancement which is inconsistent or incompatible with the connection she has formed, and the condition in life in which she has placed herself; but it does not appear to me that she is therefore precluded from the capacity of receiving the benefit of any application of money for her future advancement in life.

[*442] *I conceive that there may be various modes in which, notwithstanding her marriage, and without interfering with the condition in which her marriage has placed her, money may be efficiently applied for her advancement in life; and although no specific mode of application has been suggested, and I think that for that reason I cannot make a reference to the Master on the subject, yet it appears to me that I ought to declare that notwithstanding her marriage, and the attainment of her age of twenty-one years, she is, upon the construction of this will, entitled to have a portion of the income of the accumulated fund applied for her future advancement, and I give her liberty to apply.[2]

[1] Vide *Ellis v. Maxwell*, 3 Beav. 587. 2 Keen, 574, n. 1.

[2] Vide *Sidmouth v. Sidmouth*, post, 447. 3 Russ. 266, n. 2.

1840 —Oldfield v. Cobbett.

AMBLER v. TEBBUTT.

1840: March 30.

Several actions and suits being pending between the plaintiff and defendant, one of such actions came on for trial in the Queen's Bench, when, by consent, all matters in difference, including the suits at law and in equity then depending between the parties, were, by consent, referred to arbitration. The plaintiff, in equity, afterwards served a subpoena to hear judgment and set down the causes. The court, on motion, set aside the subpoena with costs, and struck out the causes from the list.

THERE were several actions at law and suits in equity depending between the plaintiff and defendant. One of the actions coming on for trial in the Queen's Bench, on the 13th of December, 1839, "all matters in difference, including the suits at law and in equity then depending between the parties," were by consent referred to arbitration, and the reference was made a rule of the Court of Queen's Bench.

On the 23d of December, the solicitors of the plaintiffs in equity issued and served *subpœnas* to hear judgment in the suits, and set down the causes on the Registrar's book for hearing. They also took proceedings, in the Queen's Bench, to vary the order of reference and limit it to [443] that particular action; in this however they were unsuccessful.

It was now moved, on behalf of the defendant, that the *subpœnas* to hear judgment might be set aside with costs, and that the causes might be struck out of the Registrar's book.

Mr. J. Russell for the motion.

Mr. Pemberton, contra.

THE MASTER OF THE ROLLS said, that the Court of Queen's Bench having refused to vary the order of reference, it remained in its generality as asserted by the defendant and denied by the plaintiff; the consequence was, that the plaintiff's solicitors were in error when they sued out the *subpœna*: that he therefore had no discretion, but must order the *subpœnas* to hear judgment to be set aside with costs to be paid by the plaintiff, and that these causes be struck out of the list of causes for hearing.

*OLDFIELD v. COBBETT.

[*444]

1840: January 15, 30; February 11; March 30.

Receiver's accounts were passed in the Master's office in the absence of the executor, the warrants having been regularly served on his clerk in court, but not having been forwarded to him. The court, under the circumstances, remitted the matter to the Master's office, to give the executor an opportunity of stating his objections to the accounts.

A defendant, who was the executor and residuary legatee, obtained an order to sue in *forma pauperis*; having afterwards taken the benefit of the insolvent act, he was dis-paupered, on the ground that he was then defending in his representative character only.

THE defendant was the executor and residuary legatee of his father Wm. Cobbett. Shortly after the testator's death the plaintiff instituted this credi-

 1840.—*Oldfield v. Cobbett*.

tor's suit, and Mr. West was subsequently appointed receiver of the property.

The receiver having passed his accounts before the Master, and paid over the balance, he petitioned to be discharged and have his recognizances vacated.

Mr. Pemberton for the petition.

The defendant in person opposed the petition, alleging that there were inaccuracies in the accounts, and that they had been passed in his absence, he not having been personally served with the warrants, as, he allege^d, had been directed by the Master.

THE MASTER OF THE ROLLS allowed this petition to stand over, to give the defendant an opportunity of urging his objections upon a cross petition.

The defendant accordingly presented his cross petition.

THE MASTER OF THE ROLLS, after hearing the petition, said he would make inquiries as to what had been done before he decided.

[*445] *THE MASTER OF THE ROLLS:—On communicating with the Master on this case, I find that he never did, as Mr. Cobbett has supposed, order that he should be personally served with the warrants for attendance at his office; but it appears that the solicitor for the plaintiff, at the suggestion of the Master, and for the convenience of Mr. Cobbett, consented to serve, and did on several occasions, in addition to the regular service on the clerk in court, serve Mr. Cobbett with such warrants personally, or at a place appointed by him for the service.

The solicitor for the receiver appears to have been no party to any such arrangements: he served the warrants regularly on the clerk in court, and did not serve them on Mr. Cobbett personally; he was not bound to do so, and the Master finding that the warrants had been regularly served on the clerk in court, declined, I think properly, to delay his report.

The solicitor for the receiver proceeded regularly to obtain the report; but it nevertheless appears that, in fact, the account was taken in the absence of Mr. Cobbett the executor; and although the warrants were duly served on his clerk in court, yet that communication between Mr. Cobbett and his clerk in court had previously ceased; and that communication may have ceased in consequence of Mr. Cobbett having been induced to rely on other service, which the solicitor for the plaintiff had made through indulgence. Under these circumstances, and although the solicitor for the receiver is free from all blame, yet as Mr. Cobbett clearly intended to be present on the taking of the accounts, and may have relied on receiving from the receiver the

[*446] indulgence which he had received from the plaintiff, and have thus been deprived of the means of attending the Master pursuant to the warrants; I think, that it is not unreasonable to give him now an opportunity of stating to the Master what are his objections which he has to make to the

1840.—Sidmouth v. Sidmouth.

receiver's account ; and, for this purpose, that it must be referred back to the Master to review his report.

It must, however, be understood, that the warrants are to be served in the usual manner upon the clerk in court ; and that Mr. Cobbett must hereafter, at his peril, take notice of warrants so served.

March 30 :—The defendant, in May, 1839, obtained an order to defend in *forma pauperis*, but which he had not duly served. The defendant afterwards took the benefit of the insolvent debtors' act.

A petition was now presented by the plaintiff to discharge the order, allowing the defendant to defend in *forma pauperis* on the ground that this indulgence was extended to persons who sue or defend in their own right, and not to executors and administrators.

Mr. *Kindersley*, in support of the petition, contended, that as all the defendant's interest, except as executor, had passed to his assignee, he was now defending the suit in his representative character only ; and that, by the rules of the court, he could not do so in *forma pauperis* ; he cited *Paradise v. Sheppard*.(a)

The defendant in person opposed the application.

*THE MASTER OF THE ROLLS said, the defendant was defend- [*447]
ing in the character of executor only, and he could not allow him to do so in *forma pauperis* without altering the established practice.

SIDMOUTH v. SIDMOUTH.

1840 : April 27, 28.

When property is purchased by a parent in the name of his child, it is *prima facie*, an advancement ; the implied trust in favor of the person paying the money, does not in such case arise. This presumption may, however, be rebutted by evidence, manifesting an intention that the child shall take as trustee.

Where a purchase is made by a parent in the name of a child, the contemporaneous acts and declarations of the parent are evidence to show that the child shall take as trustee only ; but the subsequent acts and declarations of the parent are inadmissible for that purpose.

Moneys were invested in the funds, by a father, in the name of his son, the dividends of which were received by the father during his life, under a power of attorney from the son : Held, after his death, that this was an advancement, and that the funds belonged to the son.

THE question in this case was, whether certain sums which had been purchased in the funds, by Lord Stowell in the name of his only son Mr. Scott, and the dividends of which had, with the concurrence of Mr. Scott, been received by Lord Stowell during his life, belonged under the circumstances to the estate of Mr. Scott, or whether Mr. Scott was a trustee for his father.

At six different times in the years 1825, and 1826, namely, on the 4th of

(a) 1 Dickens, 136, and Beames on Costs, App. 577.

1840.—*Sidmouth v. Sidmouth.*

May, the 27th of July, the 29th of October, and the 24th of November, 1825, and on the 27th of January, and the 24th of October, 1826, Lord Stowell purchased several large sums in the funds in the name of his only son Mr. Scott, and on the 13th of January, and the 24th of October, 1825, and on the 3d of August, 1826, Mr. Scott executed powers of attorney authorizing Lord Stowell and his bankers to receive the dividends, which, it appeared, [*448] had been done, and "the amount carried to the credit of Lord Stowell's account with his bankers.

It did not appear that Mr. Scott knew of the purchases at the time they were made, and in two of the cases it did not appear that he knew of the transfers, until the times when he executed the powers of attorney, but in one case he attended at the bank with his father and received the dividend warrant, which he handed over to Lord Stowell.

What took place, at the time Lord Stowell directed the purchases to be made, was detailed in the evidence of Mr. Addison, then a clerk of Lord Stowell's bankers, and was as follows:—After stating that Lord Stowell was in the habit of coming to his bankers when he had some surplus money to lay out, for the purpose of giving directions as to its investment, and that the witness almost uniformly saw him on those occasions; he stated "that a conversation of this sort usually occurred, viz: after mentioning that he had some spare money to lay out, he would say, partly as if deliberating to himself, and partly as if speaking to witness, "What shall I buy? I have some idea of buying the stock in my son's name," and after hesitating and considering for a short time, he would add, "well, I think I will buy it in my son's name," or he used expressions to that effect. That although the said Lord Stowell now and then evinced some little indecision as to whose name the stock should be purchased in, yet that all the purchases of stock which he made from the 4th of May, 1825, till the month of October, 1826, were with one exception made by his direction in the name of his son William Scott. That the witness was led to believe, as well from his conversations with Lord Stowell, as from the manner in which the stock was dealt with and

[*449] treated, that Lord Stowell "always considered that the stock, so purchased in his said son's name, still remained his own property."

In 1830, Lord Stowell made his will and two codicils, and in November, 1831, he made a third codicil, under which he intended Mr. Scott to take considerable benefits. He, however, died in November, 1835, and his father, Lord Stowell, died two months afterwards, in January, 1836.

There was some evidence of his lordship's solicitor, to the effect that in 1829 and in 1831, at an interview respecting his will, Lord Stowell had spoken of some property which Mr. Scott had in the funds, and which he had taken into account in determining the amount intended to be left to him by Lord Stowell.

There was also some evidence to show that in the enumeration of Lord

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Stowell's property, shortly before his death, but when his intellects were much impaired by age, the property in question had been included.

The interests of the parties to the suit in the funds in question were as follows:—the plaintiff, Lady Sidmouth, would be absolutely entitled to the funds in question, if they formed part of the estate of Mr. Scott; but in the event of the stock forming part of Lord Stowell's estate, the principal defendants would, under the will of Lord Stowell, be entitled thereto, in the event of the death of the plaintiff without issue.

Mr. *Pemberton* and Mr. *L. Wigram*, for the plaintiff, Lady Sidmouth, contended that the purchase by Lord Stowell in Mr. Scott's name was an advancement to the son, and did not make him a trustee for his father; and that consequently the funds in question formed part of *Mr. [*450] Scott's estate, and belonged to the plaintiff as his general legatee.

They argued that although where a purchase is made in the name of a stranger, an implied trust arises in favor of him who pays the purchase money; yet that when the purchase is made by a parent in the name of his child, the presumption is that it is made as an advancement, *Finch v. Finch*,^(a) and that the onus of proving a trust attached to the other side. That the fact of the parent remaining in possession was insufficient to rebut the presumption of law in favor of the child. *Taylor v. Taylor*,^(b) *Dyer v. Dyer*,^(c) that the rule of law was thus laid down in *Lord Grey v. Lady Grey*,^(d) "In all cases whatsoever, where a trust shall be between father and son, contrary to the consideration and operation of law, the same ought to appear upon very plain and coherent and binding evidence, and not by any argument or inference from the father's continuing in possession and receiving the profits, which sometimes the son may not in good manners contradict, especially where he is advanced but in part; and if such inference shall not be made by the father's perception of profits it shall never be made from any words between them in common discourse; for in those there may be great variety, and sometimes apparent contradictions. Therefore, when the proof is not clear and manifest, the court ought to follow the law, and 'tis very safe so to do."

They also contended that the only evidence admissible to prove a trust, must be of facts and declarations cotemporaneous, and that no subsequent acts, or *declarations of a parent were admissible, in evidence, to [*451] prove that a trust and not an advancement, was intended; that "nothing *ex post facto* could ever be allowed to alter what had been already done." *Crabb v. Crabb*.^(e) That if Mr. Scott had executed a deed of trust for Lord Stowell for life, the inference would be irresistible that it was intended that the son should take in remainder beneficially; that the power of

(a) 15 Ves. 43.

(b) 1 Atkins, 386.

(c) 1 Watkins on Copyholds, 4th ed. 277, and 1 P. Williams, 112, n., and 2 Cox, 92.

(d) Ca tem. Finch, 340, and see 2 Swan. 594.

(e) 1 Myl. & K. 511; and see *Kilpin v. Kilpin*, ib. 537; and *Murless v. Franklin* 1 Swan. 13.

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attorney, which was revocable, and would lose its operation on the death of Mr. Scott, was still stronger in proving that he was not wholly a trustee for his father. That the obvious purpose was by a gift *inter vivos* to avoid the payment of probate and legacy duty.

Mr. *Hall* for Lord Sidmouth and Mr. Chisholme, a trustee, submitted to any decision of the court.

Mr. *Kindersley* and Mr. *H. Williams*, for the representatives of Lord Eldon, and Mr. *Purvis*, for Mrs. Forster, a party in the same interest, contended there was a clear trust of the stock in favor of Lord Stowell; that there was evidence sufficient to rebut the ordinary presumption that Mr. Scott was to take beneficially. The execution by him of the powers of attorney—his acquiescence for so many years in the receipt of the dividends by his father, showed plainly that the father and not the son was intended to have the benefit of the investment. That the fact of a father retaining possession had always been looked on as strong evidence against an advancement. In *Woodman v. Morrel*,^(a) a daughter was decreed to surrender copyholds on that ground; and in *Murless v. Franklin*,^(b) it was considered that [*452] "possession taken by the father at the time, would amount to evidence to show that the father intended the purchase for his own benefit.

They argued, that if the son took the whole beneficial interest, the father's estate might, contrary to the intention, be accountable for the receipts of the very dividends; that if a partial interest was intended to be reserved by the father, then the onus of proving the limits of that interest was on the plaintiff; and that it might fairly be assumed that Lord Stowell intended his son to take the property, only in the event of his surviving him.

That the authorities cited were distinguishable. The case of *Lord Grey v. Lady Grey* turned on this, that the son joined in a security for the purchase money. In *Taylor v. Taylor*, the infancy of the child was the main point relied on, as it would be absurd to appoint an infant trustee; and in *Crabb v. Crabb*, the testator had evinced his intention by directing the dividends to be paid to the son.

That Mr. Scott was adult at the time, and living with his father, and that no marriage or settlement in life appeared to have been then contemplated, which rendered such a provision for him necessary. They also cited *Swift dem. Farr v. Davis*.^(c)

Mr. *Turner* and Mr. *Allfrey*, for Mr. Sanderson, in the same interest, cited, in addition, *Stileman v. Ashdown*,^(d) *Loyd v. Read*,^(e) and a manuscript case of *Loriet v. Loriet*, before Sir John Leach, in November, 1825.

[*453] *Mr. *Pemberton*, in reply.

April 28.—THE MASTER OF THE ROLLS:—The plaintiff in this

(a) *Freeman*, C. C. 32.

(d) 2 *Atk.* 477.

(b) 1 *Swan.* 17.

(e) 1 *P. Williams*, 606.

(c) 8 *East*, 354, n.

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cause is the legal personal representative of her late brother, William Scott, and as such she claims to be entitled to the sum of 5500*l.* three per cents., the sum of 7000*l.* three per cent. reduced annuities, and the sum of 21,000*l.* three and a half per cent. annuities, which were standing in the name of Mr. Scott at the time of his death; the defendants are, Lord Sidmouth and Mr. Chisholme the executors of Lord Stowell the father of Mr. Scott and of the plaintiff, Elizabeth Foster. and Richard Burden Sanderson, who are represented to be two of the next of kin of Lord Stowell, (exclusively of his daughter and her issue,) and the executors of the late Lord Eldon, who is represented to have been the only other next of kin of Lord Stowell, (exclusively of his daughter and her issue.)

Mr. Scott died on the 26th of November, 1835, in the lifetime of his father, Lord Stowell, who died on the 28th of January, 1836. The death of Mr. Scott was not made known to his father, and for some time after Lord Stowell's death, it was supposed that Mr. Scott had died intestate, and on this supposition administration of his estate was granted to his father's executors, and they procured the sums of stock which are in question to be transferred into their names. After the will of Mr. Scott was discovered, administration of his estate was granted to the plaintiff.

By the will of Mr. Scott, the whole of his personal estate was bequeathed to the plaintiff.

By the will of Lord Stowell, his residuary estate is contingently given in trust for the persons who, under "the statute of distribu- [*454] tions, would be entitled to his personal estate in case he had died intestate and without issue.

The several sums of stock which were standing in the name of Mr. Scott at the time of his death, were all of them purchased by the directions and with the money of Lord Stowell; and under these circumstances, the plaintiff contends that the stock so purchased by the father in the name of the son, was an advancement to him, and constituted part of his estate, and now belongs to her as his legal personal representative; whilst the defendants, the next of kin (exclusively of the plaintiff and her issue) contend that the purchase was made under circumstances which constitute Mr. Scott a trustee for his father, Lord Stowell, and that, notwithstanding the transfer of the stock into the name of Mr. Scott, the beneficial interest therein was vested in Lord Stowell, and formed part of his estate, and upon the happening of the contingency contemplated by him will belong to his next of kin.

The law applicable to cases of this nature is subject to so little doubt that it has not been questioned in the argument of this case. Where property is purchased by a parent in the name of his child, the purchase is *prima facie* to be deemed an advancement; the resulting or implied trust which arises in favor of the person who pays the purchase money, and takes a conveyance or transfer in the name of a stranger,[1] does not arise in the case of a purchase

[1] As to resulting trust, in cases of this description, see *Botsford v. Burr*, 2 Johns. Ch. Rep. 405, 409.

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by a parent in the name of a child ; but still the relation of parent and child is only evidence of the intention of the parent to advance the child, and that evidence may be rebutted by other evidence, manifesting an intention that the child shall take as a trustee ; and in this case, as in most others of [*455] *the like kind, the only question is, whether there is such other evidence.

That cotemporaneous acts and even cotemporaneous declarations of the parent may amount to such evidence, has often been decided. Subsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so ; but generally speaking, we are to look at what was said and done at the time.

In this case, the only evidence showing what was done at the time is that of Mr. Addison, who says that Lord Stowell was in the habit of going to the banking house of Child & Co. when he had surplus money to lay out, and that on such occasions a conversation of this sort usually occurred, viz., after mentioning that he had some spare money to lay out, he would say, partly as if deliberating to himself, and partly as if speaking to witness, "What shall I buy ? I have some idea of buying the stock in my son's name ;" and after hesitating and considering for a short time, he would add, "Well, I think I will buy it in my son's name," or he used expressions to that effect. The witness then proves the stock to have been purchased by the directions of Lord Stowell in his son's name, and leaving it to be supposed that the vague language he has described was employed on the several occasions of those purchases, he says it was understood by the bank that the stock was to be held by the son at the entire and absolute disposal of the father.

This understanding is not material, as we are to consider what it is of which the facts are evidence ; and I am of opinion that the species of deliberation which was manifested by Lord Stowell, and supposing it [*456] to have *occurred on every occasion of transfer, affords no evidence whatever that he intended his son to be a trustee of the stock. I cannot suppose him to have been ignorant of the legal effect of buying the stock in the name of his son ; and it seems much more probable that any hesitation which he evinced was occasioned by a deliberation whether he should or not make an advancement for his son, than by a deliberation whether he should or not make his son a trustee for him at a time when he had other stock standing in his own name, and in which it does not appear that any convenience could be obtained by making his own son a trustee for him of part of the stock of which he was the owner.

As far as acts strictly cotemporaneous appear, there does not appear to be any thing to manifest an intention to make the son a trustee for the father. The circumstance that the son was adult does not appear to me to be material.[1] It is said that no establishment was in contemplation, and that no necessity or occasion for advancing the son had occurred, but in the relation

[1] Vide *Scawin v. Scawin*, 1 Yo. & Coll. C. C. 65. Cited post, 459, n.

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between parent and child, it does not appear to me that an observation of this kind can have any weight. The parent may judge for himself when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him, and it does not follow that because the reason for doing it is not known, there was no intention to advance at all.

But then it is said that the powers of attorney, which enabled the father or the father's bankers to receive the dividends, though not strictly cotemporaneous, followed so soon upon the transfers as to show that they were part of the same transaction. In none of the cases does it appear that Mr. Scott knew of the transfers at the time *when they were made; [*457] in two of the cases it does not appear that he knew of the transfers until the times when he executed the powers of attorney; but in one of the cases he had attended at the bank, and himself received the dividend warrant, and consequently knew of the transfer before he executed the power of attorney; he then permitted his father, who was present, to deal with the dividend as he pleased. These circumstances are not conclusive, but they appear to me to make it probable, that at the time when the transfers were made, Lord Stowell intended that the dividends should be received by himself. Whenever that intention was formed, Mr. Scott acquiesced in it.

But supposing that the demand of the powers of attorney afford evidence of Lord Stowell's intention at the times of the several transfers, I am of opinion that it cannot thence be deduced that Lord Stowell, at the same times, intended his son to be a mere trustee for him. Consider the situation in which they stood,—the son unmarried, living in the house of his father, and wholly maintained by him, having future expectations from another source, but no present maintenance except from his father, and having very great future expectations from his father's large property; and then consider what the father could mean by transferring sums of stock into the name of his son, with an intention to receive the dividends himself. It is clear that he meant to continue to maintain his son; it is probable that if he had meant only a contingent provision in the event of the son surviving him, he would have made a transfer into the joint names of himself and his son, for this would have given the absolute power over the stock to the survivor; [1] if he had intended, notwithstanding the transfer to the son, to retain the absolute dominion in himself, it is probable he would have taken care to *extend the power so as to enable himself to sell and transfer; but it [*458] is scarcely to be conceived why he should make any transfer at all, if

[1] One seized of a copyhold estate for the joint lives of himself and J., and the survivor, surrenders it to the lord and takes a new grant for the joint lives of himself, J., and W., the surrenderer's son, and the longest liver of them; it was held, under the circumstances of the case, that this was intended to be an advancement for W. *Skeats v. Skeats*, 2 Yo. & Col. C. C. 9.

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he intended the son to have neither any present interest in the stock, nor any power over it, nor any future benefit of any kind from it.

It seems to me to be, if not a necessary, yet an extremely probable inference from the circumstances, that the father intended to make the son, to the extent of these transfers, secure for the future ; but at the same time intended to make the son, for the present, dependent upon himself for his support ; that although he adopted a mode of proceeding which gave power to the son to revoke the letters of attorney and sell the stock, yet he relied, and reasonably, upon his own parental influence, upon the habitual deference of his son, and upon the conformity to his own will which he might expect in a son who had so much to expect from him, that no improper advantage would be taken of the power which the son obtained by the transfer ; and so, in fact, they went on : the son was maintained by the father, who continued to receive the dividends.

The evidence of Mr. Chisholme, so far as it shows that at a subsequent period Lord Stowell referred to this stock as a provision to that extent made for Mr. Scott, is material ; it was quite consistent with its being an advancement that Lord Stowell should take it into consideration to determine what further provision he should make for Mr. Scott by his will. The other parts of the evidence of Mr. Chisholme I do not consider to be important : Lord Stowell does not appear at the time to have accurately recollected the particulars of the stock which he had transferred, and Mr. Chisholme may not have succeeded in accurately collecting the very words which Lord [*459] Stowell used ; but I do not find any thing in any part of the evidence, which is inconsistent with the material part, by which it is shown that Lord Stowell himself considered that by the transfers he had made a provision for his son.

The evidence of Mr. Balley, as to the conversations between him and Lord Stowell, I consider to be wholly immaterial. With respect to Mr. Scott, Mr. Balley says that he was in want of money, and did not know that he had this stock to resort to, and when told of it, thought he could not use it in his father's lifetime.

On the other hand, it is said, that Mr. Scott could not have wanted money, because he had always a balance in the hands of his bankers. I do not think it important whether he was in want of money or not ; under all the circumstances, a balance at his bankers, who were also the bankers of his father, does not appear to prove that he was not. But the conversations with Mr. Balley prove nothing as to the rights of the parties, and if Mr. Balley gave the information about the stock to Mr. Scott in the year 1834, Mr. Scott was concurring in an arrangement recommended by the late Lord Eldon and by Lord Sidmouth, which was much more beneficial to himself.

On the whole, I think there is not, in this case, any thing to rebut the ordinary presumption, which arises from an investment by a father in the name of his son ; and I think that the several sums of stock which are in question,

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form parts of the estate of William Scott, and belong to the plaintiff as his representative.[1]

*Between MARIA GUY and MARY GUY, Infants, by WILLIAM [*460] CARNS, their next Friend, Plaintiffs; and AMELIA GUY and Others, Defendants.

1840 : April 23, 30.

Bill filed by two infants ; one attained twenty-one before decree ; her name as co-plaintiff struck out on her application, with the costs of the application.

Suit improperly instituted on behalf of an infant, dismissed with costs, on motion, upon the application of the infant by A. B., a person not then a party to the suit, "as her next friend, for the purpose of the application."

THIS suit was instituted in the name of the infant plaintiffs by their next friend, a person unconnected with their family ; on the 6th of March, 1840, Maria Guy attained her age of twenty-one years. It was now moved on her behalf that the above named William Carns might be restrained from taking any further proceedings in this suit in her name, and that her name might be struck out of this suit as a plaintiff, and that William Carns might pay the costs of this application ; and also for a reference to the Master, to inquire if it was for the benefit of the infant plaintiff, Mary Guy, that this suit should be prosecuted.

No decree had been made.

It was alleged that the suit had been improperly instituted, and the circumstances being such as to induce the court to come to that conclusion, it is unnecessary further to state them.

Mr. *Pemberton* and Mr. *W. C. L. Keene*, in support of the motion, contended that the plaintiff, having attained twenty-one, had a right to have her name struck out as co-plaintiff, *Acres v. Little* ;(a) and the suit not appearing to be for the benefit of the other infant, that *it ought to [*461] be dismissed ; *Fox v. Suwerkrop* ;(b) and *Sale v. Sale* ;(c)

(a) 7 Simons, 138.

(b) 1 Beavan, 583.

(c) Ib. 586.

[1] In *Scawin v. Scawin*, 1 Yo. & Coll. C. C. 65, Knight Bruce, V. C. says ; " It is settled that a purchase by a father in the name of his son, is *prima facie* an advancement of the son. The presumption is so, but of course this presumption may be rebutted. The father may certainly, even in cases where the doctrine of advancement is held to take place, receive the title deeds and the dividends ; but although those circumstances may exist in such cases, yet they are circumstances in favor of the father, especially where the son is adult." In that case there was a subscription by the father of one hundred shares in a joint stock bank in his own name, and fifty shares in the name of his son ; and he paid the deposits and calls, not only on the one hundred, but on the fifty shares : it was held, under the circumstances, that there was not in this case an advancement for the son. One circumstance was, that the father, who had received the certificates for both classes of shares, also received the dividends ; as to which the Vice-Chancellor said : " Upon the principle laid down in *Merless v. Franklin*, (1 Swanst. 13,) the receipt of dividends by the father is a circumstance in his favor, though not conclusive." See further *Hill v. Gomme*, 1 Beav. 554. *Frankerd v. Frankerd*, 1 Sim. & Stu. 1. *Skeats v. Skeats*, 2 Yo. & Coll. C. C. 9.

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Mr. *Bethell* and Mr. *Puller*, contra, argued that the proper mode of withdrawing from the suit was by giving notice to the next friend and the clerk in court, and not by a motion; and that, at all events, the motion could only be granted on terms; as the suit would otherwise be rendered imperfect. That no reference could be directed as to the other plaintiff, as no application was now made on her behalf. As to dismissing the bill, they observed that it was not asked by the notice of motion.

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS considered that the infant, having attained twenty-one, had a right to withdraw from the suit, and to have the costs of the application.[1]

As to the other part of the case, he said that he could make no order on the present motion, but that he would leave it open to the parties to make such application, on behalf of the infant plaintiff, as they might be advised.

April 30.—A motion was now made "by the infant plaintiff Mary Guy, by the late plaintiff Maria Guy, her sister, and next friend for the purpose of this application; that the bill might be dismissed with costs to be paid by William Carns, the next friend."

Mr. *Pemberton* and Mr. *W. C. L. Keene* in support of the motion, cited *Sale v. Sale*(a) and *Fox v. Suwerkrop*.(b)

[*462] *Mr. *Bethell* objected that the application ought not to have been made by Maria Guy as next friend, she being now no party to the suit, and such applications having always heretofore been made through a defendant; and secondly, that there ought to be a reference to the Master to inquire as to the propriety of the suit.

THE MASTER OF THE ROLLS, upon the evidence before him, being of opinion that the suit was improper, followed the authorities cited, and granted the motion.[2]

(a) 1 Beavan, 586.

(b) 1 Beavan, 583.

[1] Vide 2 Keen, 248, n. 1. Macpherson on Infants, 364. The infant's coming of age is no abatement of the suit, but he may elect whether he will proceed with it or not. If he goes on with the cause, all subsequent proceedings may be carried on in his own name, and the bill need not be amended or altered. Macpherson, *loc. cit.* But where a suit had been instituted for the benefit and protection of two infants, and the court was of opinion that the object of the suit could not be effected till they both attained twenty-one, it dismissed with costs a petition by the elder on reaching that age, praying that the bill might be dismissed against her, or that she might be indemnified against the future costs of the suit. *Ibid*, citing *Smith v. Lyster*, 19 L. J., 344.

[2] Vide 1 Beav. 585, n. 1.

1839.—*Sainsbury v. Jones.*

SAINSBURY v. JONES.

1839: May 6, June 1, 3.

A. B., an attorney, representing himself to be authorized by the owners, entered into an agreement on their behalf, to sell a house to the plaintiff, and he received a deposit. The plaintiff filed a bill against the owners and A. B., praying a specific performance, and in the alternative, that if the agreement could not be enforced against the owners, then that A. B. might repay the deposit and the costs incurred by the plaintiff, and of the suit. It appeared at the hearing that A. B. had no authority to sell: Held, that the remedy of the plaintiff against A. B. being altogether at law, could not be had in this suit, and the bill was dismissed with costs.

STEPHEN JONES and Margaret Doggerell, being owners of a house and premises at Bath, Mr. Chitty, an attorney, entered into an agreement in writing with the plaintiff, whereby, representing himself "as the lawfully authorized agent of them the said Stephen Jones and Margaret Doggerell," he agreed on their behalf for the sale to the plaintiff of the property in question.

At the time of the execution of the agreement the plaintiff paid to Chitty a deposit of 20*l*.

The plaintiff filed a bill against Stephen Jones and Margaret Doggerell for the specific performance of the agreement; and Margaret Doggerell, by her answer, stated, as the fact was, that she had not authorized *Chitty [*463] to sell the property, and (as was also the fact) that Jones at and previous to the time of the alleged sale, was a lunatic and incompetent to give such authority.

The plaintiff thereupon amended his bill by making Chitty a party, and adding an alternative prayer, that in case it should appear that the agreement could not be enforced, by reason of the said Stephen Jones being a lunatic, or otherwise by reason of want of authority of Chitty to sign or enter into the same, then that the same might be cancelled; and in that case that Chitty might be decreed to pay and reimburse to the plaintiff the deposit paid by him as aforesaid, and the moneys expended by him in buildings on the premises, and the costs and expenses incurred by him in investigating the title to the premises, and endeavoring to enforce the performance of the agreement, and otherwise in relation thereto, and the costs of this suit.

The plaintiff had incurred some expenses in repairs and improvement of the premises; and also in the investigation of the title, an abstract of which had been furnished by Chitty.

Chitty, before the institution of the suit, had offered as follows:—"The best plan will be to repay your client his deposit and expenses, and wait a little while till the family are in a situation to satisfy the contract or rescind the contract altogether."

The want of authority and lunacy of Jones were proved.

The cause now came on for hearing, when

Mr. *Girdlestone* and Mr. *Hetherington*, for the plaintiff, contended, that if the contract could not be *enforced, then that such a fraud had [*464]

1839.—*Sainsbury v. Jones.*

been committed by the defendant Chitty, an officer of the court, as to render him personally liable to what was prayed against him; that the court always entertained jurisdiction in cases of fraud and misrepresentation, and that the authorities warranted the granting the relief here asked, in respect of the deposit and costs, without putting the parties to their action at law.

Mr. *Tinney* and Mr. *Lovat*, for Mrs. *Doggerell*, argued that no authority to sell had been given by her.

Mr. *Cooper*, for Chitty, contended that, although he had acted imprudently and under a wrong impression, he had not acted fraudulently.

That the plaintiff was aware, when he filed his bill, of the impossibility of obtaining a decree, and was wrong both in the institution of the suit, and in making Chitty a party by amendment; *Nicloson v. Wordsworth*.(a)

And as to the personal relief sought against Chitty, that, whatever might have been the rule formerly, it had been now completely settled, that this court would not give relief by way of damages, which was the province of a court of law; and that if the plaintiff had any claim for damages against Chitty for the misrepresentation, he ought to have proceeded at law: *Denton v. Stewart*,(b) *Greenaway v. Adams*,(c) *Todd v. Gee*,(d) and that this objection applied equally to the deposit: *Williams v. Edwards*.(e)

[*465] *The following cases were cited on the hearing here and on the appeal: *Sowerby v. Warder*,(g) *Arnot v. Biscoe*,(h) *Evans v. Bicknell*,(i) *Burrowes v. Lock*,(k) *Parrot v. Wells*,(l) *Bennet v. Vade*,(m) *Bowles v. Stewart*,(n) *Bulkeley v. Dunbar*,(o) *Nelthorpe v. Pennyman*,(p) *Clifford v. Brooke*,(q) *Johnson v. Ogilby*.(r)

THE MASTER OF THE ROLLS:—(After stating that no decree for specific performance could be made, and that the bill must be dismissed with costs as against Jones and Doggerell,) said, the question which remains is, the recovery from Chitty of the deposit, and damages. The question is, whether where a party, having no sufficient authority, enters into an agreement, the disappointed purchaser can come here for the recovery of damages which he has been put to. No authority was produced, and I believe that none exists, for such an interposition by this court. Judges have always in modern times thought, that this was not the court for the recovery of damages, and that the proper mode of obtaining relief was by an action at law; and it is reasonable that it should be so. It is painful to be compelled to refuse assistance to the plaintiff, who has sustained damages; but it appears to me that he is not entitled in this court to the relief which he asks against Chitty, and as to

(a) 2 Swan. 365.

(d) 17 Ves. 273.

(h) 1 Ves. sen. 94.

(l) 2 Vernon, 127.

(o) 1 Anst. 37.

(g) 13 Ves. 131; Sugden's V. & P. vol. i. 45; and cases in note (y).

(b) 1 Cox, 258.

(e) 2 Sim. 78.

(i) 6 Ves. 173.

(m) 2 Atk. 324.

(p) 14 Ves. 517.

(c) 12 Ves. 395.

(f) 2 Cox, 268.

(j) 10 Ves. 470.

(n) 1 Scho. & Lef. 227.

(r) 3 P. W. 277.

1840.—*Viner v. Vaughan.*

him also, the bill must be dismissed.[1] I must look to the answer before I decide the question of costs.

*If, as is represented in Chitty's answer, the state of mind of [*466] Jones was known to the plaintiff and his solicitor previous to the filing of the bill, the plaintiff has prosecuted this suit, knowing that the relief which he asks for could not be obtained.

June 3:—THE MASTER OF THE ROLLS said that he had read the answer of Chitty, which stated he had no authority to enter into the contract; and that the plaintiff knew, at the time of filing his bill, that he was not entitled to the relief thereby claimed. That without expressing any opinion as to the liability of Chitty in a court of law, he thought the bill must be dismissed as against him, with costs.[2].

Affirmed, with costs, by the Lord Chancellor, on the 18th of November, 1839. [The case on appeal is reported 5 Myl. & Cr. 1.]

VINER v. VAUGHAN.

1840: April 23.

A tenant for life has no right to open mines or clay pits: but where the author of the settlement has previously worked them, the tenant for life may continue.

Whether a tenant for life can work mines or clay pits, the working of which had been abandoned by the author of the settlement, *quære*?

THIS was an application, on the part of persons entitled in remainder, for an injunction, the effect of which was to restrain a tenant for life, and her agents and the defendant Hendy, from digging and carrying away brick earth from the property in question.

*The testator had devised his real and personal estate to trustees, [*467] their heirs, executors, administrators, and assigns, upon trust to receive, take, and pay the rents, issues and profits, interest and dividends of his

[1] Lord Cottenham, on the appeal in this case, said; "Had it been supposed that this court had the jurisdiction contended for, every bill for a specific performance would have prayed compensation, in the event of the vendor proving not to have a good title. It is true that, in this case, the compensation sought is not against the vendor, but against a person who falsely assumed authority to sell; but this places the case still wider from the principle upon which this court exercises its jurisdiction in cases of contract; because, as against such agent, there is no case of contract, but a mere claim for compensation, for damages arisen from their being none which the purchaser can enforce. As to the 20*l.* deposit, if the suit cannot be sustained upon other grounds, it certainly cannot be supported in merely seeking a return of that small sum. That also is a claim at law." 5 Myl. & Cr. 4.

[2] So, Lord Cottingham, in this case, said; "He [the plaintiff] then knew that he could not compel a specific performance of the contract; and having sought compensation for damages in a court which had not jurisdiction to award them, I think the decree of the Master of the Rolls, dismissing the bill with costs as against Chitty was correct; and I am under the necessity of now adding to such costs the costs of the appeal."

1840.—*Viner v. Vaughan.*

real and personal estates respectively, unto his wife Amy or her assigns for and during the term of her natural life, provided she continued a widow ; and from and immediately on the decease or marriage of his said wife Amy, whichever might first happen, then upon trust to sell and invest the produce, and pay, assign, transfer, and divide his said trust moneys, and the interest, dividends, and produce thereof, unto and between his daughters, the plaintiff Amy, and Jane, Betsey, Hannah and Clarissa, equally, share and share alike, as tenants in common, when and as they should severally attain the age of twenty-one years ; and in the meantime to apply the dividends towards their maintenance and education.

After the testator's death in 1823, the widow entered into possession of the property, part of which contained brick earth. She had recently entered into an agreement with the defendant Hendy to permit him to excavate and work the brick earth for the purpose of making bricks, and Hendy had commenced working the clay pits and removing the soil.

The plaintiff, Amy Viner, filed this bill for an account of the soil taken and of the amount of injury suffered, for payment thereof, and for an injunction.

A motion was now made for an injunction ; affidavits were made in support and in opposition to the motion, which were rather contradictory. It

appeared, however, that the former owner, from whom the testator [*468] purchased the property, had worked the clay pits ; that *the testator had purchased the property a few years before his death, and had filled up part of the excavations made by the former owner, but that immediately before his death he had made some preparations for brickmaking on the premises.

Mr. *Pemberton* and Mr. *Austen*, for the motion, contended that the widow, a tenant for life impeachable for waste, had no right to dispose of the very soil of the property, and injure the surface in the manner in which she was proceeding to do ; and secondly, that a tenant for life had no right to work mines or clay pits, the working of which had been abandoned by the settlor, or which had only been used for purposes of temporary convenience by a former owner.

Mr. *Stuart* and Mr. *Lewis*, contra, contended that it was not competent for a party entitled in remainder to an undivided share in the purchase money of an estate vested in trustees for sale, to file a bill of this description, and that the trustees alone had a right to interfere.

That where mines or clay pits (the law regarding which was the same) were open at the time of the settlement, the tenant for life had a right to work and have the benefit of them as part of the profits of the land. *Saunders's Case*, (a) *Clavering v. Clavering*, (b) *The Countess of Plymouth v. Lady Archer*, (c) and Co. Lit. 53, b. were cited.

Mr. *Pemberton*, in reply, insisted that there was a distinction between

(a) 5 Coke's Rep. 12, a.

(b) 2 P. Williams, 388.

(c) 1 B. C. C. 159.

1840.—*Viner v. Vaughan.*

working minerals and brick earth; in the former case the unprofitable substratum was *taken away, but in the latter the soil or the estate itself was removed; that where the working of mines, &c., had been discontinued, they could not be subsequently worked by the tenant for life. That there was no proof of any working at all by the last owner, and only a temporary one by the previous possessor of the property. [*469]

THE MASTER OF THE ROLLS:—In this case the defendant Mrs. Vaughan is tenant for life of the property in question under the will of her husband. It is said she is equitable tenant for life, the legal estate being vested in trustees. After her death or marriage the estate is to be sold, and the money to arise from the sale is to be divided amongst her children, of whom the plaintiff is one; the plaintiff is therefore entitled to one-fifth of the money to arise from the sale of the estate after the death of the tenant for life. The defendant, the widow, has authorized the other defendant James Hendy to take away the substance of the land, and the plaintiff naturally complains that it is to her prejudice, and to prevent it she asks for an injunction. I have no doubt that she has a right to demand this protection, without relying on the trustee to ask it; according to the principles of justice, she has a right to ask to have an injury to her rights prevented. The words of the will do not entitle the widow to proceed in the mode she is doing: she is tenant for life simply, and is therefore impeachable for waste. On the general law there is no controversy: a tenant for life has no right to take the substance of the estate, by opening mines or clay pits: but he has a right to continue the working of mines or clay pits where the author of the gift has previously done it; and for this reason, that the author of the gift has made them part of the profits of the land; but it does not follow that the tenant for life has a right to open old abandoned pits and mines, or to commence *open- [*470] ing any mines or pits which the author of the gift has merely made preparations for opening. This, however, is the question in this case; it appears there were old pits which had not been worked for twenty years; it is stated that the last owner, for some purpose or other, had taken some clay out of them, and had made some preparations for working them, yet it is not stated in the affidavits, that these pits were in the course of working at the time of the testator's death; this, therefore, was not an open mine in the course of working at the death of the testator: and the only question now before me is, whether a tenant for life is to be allowed to take away the substance of the estate before this question has in some way or other been tried; I think there is so much doubt, whether they were in such a state as to entitle the tenant for life to work them, that the defendant ought not to be allowed to proceed until that question has been tried. An injunction must therefore be granted.[1]

Affirmed by the Lord Chancellor, 9th June, 1840.

[1] As to the right of tenant for life, impeachable of waste, to cut down timber trees in a state of decay, see *Tollemache v. Tollemache*, 1 Harr, 456

1840.—Wilkinson v. Charlesworth.

WILKINSON v. CHARLESWORTH.

1840: April 16.

A. B., on whose estate the plaintiff had a charge for principal and interest, being desirous of paying it instead of having it raised out of the estate, was ordered to pay it into court by a given day. He made default, and applied for an extension of the time, which was granted: Held, that the plaintiff was not entitled to subsequent interest on the aggregate of principal and interest due, but on the principal only.

THE plaintiff was entitled to a charge of 12,000*l.* on an estate which belonged to ten different persons, who, instead of having the sum raised [*471] out of the estate under the decree, were desirous of paying it off; an order was in consequence made, by which each of the parties was ordered to pay into court one-tenth of the amount of principal and interest due. The several parties obeyed the order except A. B., who allowed the time to expire without paying in his share of the money due, which amounted to 1700*l.*, of which 1200*l.* was principal money.

Mr. *Ellison*, on his behalf, now moved to extend the time for paying the money into court.

Mr. *Tinney* and Mr. *Pemberton*, contra, contended that this indulgence ought not to be given except on the terms of the applicant paying interest on the whole 1700*l.*, together with all the costs incurred by his disobedience of the order.

Mr. *Ellison*, in reply, contended, that the subsequent interest ought only to be paid on the principal sum of 1200*l.*

THE MASTER OF THE ROLLS:—It is almost of course to give leave to pay in the money ;[1] but the question is, on what terms. It certainly is not strict justice, that the plaintiff, who has been kept out of his money, should not have interest on the whole amount; but I do not think that I can make an order charging Mr. B. with compound interest ;[2] he must, however, pay the costs which have been occasioned by his neglect to comply with the previous order.

[1] Vide *Haigh v. Grattan*, 1 Beav. 201.

[2] Vide post, 480, n. 1.

1840.—Williams v. Nixon.

*WILLIAMS v. NIXON.

[*472]

1840: May 5

Two executors were directed, after making some annual payments, to invest and accumulate the surplus. One of the executors received the dividends of stock for several years, and misapplied them: it did not appear that the other executor had any knowledge thereof: Held that the latter was not answerable for the breach of trust.

Two executors sold out stock, and the produce was received by one: Held that the other was responsible for its misapplication, but was entitled to an inquiry, whether any part had been applied in discharge of claims against the testator.

The official assignee of a defaulting trustee whose assets had been distributed held not entitled to costs.

THE testator by his will gave his residuary estate to the defendants Nixon and Mills, in trust, to pay an annuity of 200*l.* a year to his widow, annuities of 10*l.* each to his three sisters, and an annuity of 500*l.* a year to his son until he attained forty-five; they were to invest and accumulate the remainder until the son attained forty-five, and then to pay him the income for life, with remainder in trust for the son's children. The will contained an indemnity clause, that the trustees and executors should not be answerable for one another, or for the defaults of the other, and should be accountable only for the moneys which should actually come to their hands respectively.

The testator died in 1825, and both his executors proved his will; his property principally consisted of money in the funds, which produced an income of nearly 1200*l.* a year. Nixon left the management of the testator's affairs entirely to Mills, who received the dividends, paid the annuities, &c.; but neglected to invest the surplus; in 1834, Mills became bankrupt, and was found a debtor to the estate in the sum of about 6099*l.*

It appeared, that in 1826, Nixon concurred with Mills in the sale of a sum of 450*l.* 3 per cents., the produce of which was retained by Mills. As to this Nixon said that the testator held a farm on lease, which it became desirable to give up, and that the stock in question had been sold [*473] and applied in discharge of the claims of the landlord in surrendering the lease.

The testator's son died in 1831, under forty-five, leaving the plaintiffs, his infant children.

The bill was filed in 1833.

The debt of 6099*l.* had been proved under Mill's commission, and 609*l.* had been paid in respect thereof; his assignees were made parties by supplemental bill.

The cause now came on for further directions on the Master's report.

Mr. *Pemberton* and Mr. *F. Bayley* for the plaintiffs, the residuary legatees, contended that the defendant Nixon was liable for the 450*l.*, he having joined in selling it out of the funds. That by proving the will he had accepted the trusts, *Mucklow v. Fuller*, (a) and become bound to see to their due perform-

1840.—Williams v. Nixon.

ance by his co-trustee. That he had notice of the trusts of the will, and of the situation and value of the testator's estate : that he must have known that there was a large surplus of income, which ought to have been half-yearly invested by Mills, and that it was his duty to have seen it done. That having stood by, and allowed his co-trustee to commit a breach of trust, he became, by his neglect to interfere, personally responsible, *Booth v. Booth* ;(a) and that the trustee indemnity clause did not relieve him from this liability, *Mucklow v. Fuller*.(b)

Mr. *Kindersley* and Mr. *Puller*, contra, for Mr. Nixon, contended [*474] that he was justified in joining in selling out the 450*l.* which was wanted for the purpose of administering the estate of the testator, and also in allowing his co-executor to receive it for that purpose. That even if he was liable in the first instance for this sum, still he was entitled to discharge himself by showing that it had been applied in payment of valid claims upon the testator's estate, *Shipbrook v. Hinchinbrook*,(c) *Underwood v. Stevens*.(d) That it had neither been charged nor proved that Nixon had any knowledge of the misapplication of the funds by his co-executor, and that he could only have ascertained and prevented it by taking expensive legal proceedings, which he was not justified in doing. That his co-executor had done no more than the law allowed, which permitted one of several executors to receive dividends, and deal with the testator's estate, without the concurrence of his co-executor, and in this respect, the case differed from that of joint trustees. That he had proved the will on the faith of the indemnity clause in the testator's will, which declared he should not be answerable for the defaults of his co-executor, and in the face of that declaration, the court ought not now to visit him with the defaults of Mills.

Mr. *Bethell* for the assignees of Mills.

Mr. *W. H. Clarke* for another defendant.

Mr. *Pemberton*, in reply :—By proving the will, Nixon had notice of the trusts for accumulation, and on taking out probate, he must have sworn to the amount of the property, and must, therefore, have been cognizant of the particulars. He knew the charges created by the will, and that [*475] there was a large surplus to be invested ; yet he does not appear to have made any inquiry as to the investment ; if he had, he must have become aware of the breach of trust, and must have sanctioned it.

THE MASTER OF THE ROLLS :—The question in this case is, whether the defendant Mr. Nixon is to be charged with the moneys which was received by his co-executor Mr. Mills. With regard to a portion, namely, the produce arising from the sale of the stock, in which Mr. Nixon concurred, he clearly is liable.

There can be no doubt, that if an executor knows that the moneys re-

(a) 1 Beavan, 125.

(b) Jacob, 198.

(c) 11 Ves. 252.

(d) 1 Mer. 712.

1840—Williams v. Nixon.

ceived by his co-executor are not applied according to the trusts of the will, and stands by and acquiesces in it, without doing anything on his part to procure the due execution of the trusts, he will, in respect of that negligence, be himself charged with the loss; but in cases of this kind it is always to be observed that the testator himself, having invested certain persons with the character of executors, has trusted them to the extent to which the law allows them to act as executors; and in that character each has a separate right of receiving and of giving discharges for the property of the testator. In this particular case the testator having money in the funds and other property to a considerable amount, directed certain annuities to be paid, and bequeathed his residuary estate in the mode stated. Both executors proved the will, and thereupon each of them became entitled to receive the property.[1] One of them did receive the property—the dividends upon the stocks, and funds, and the other personal estate. If Mr. Nixon knew that his co-executor was misapplying the moneys thus received, and acquiesced in it, he *be- [476] came himself liable; because he was a witness and an acquiescing party to the misapplication or breach of trust;[2] but if he was not aware of the misapplication, I know of no case in which the court has gone the length of saying, that an executor shall be held personally answerable for standing by and permitting his co-executor to do that, which, for any thing he knows to the contrary, was a performance of the trusts of the will. In this case it is clear Mr. Nixon must have known there was stock in the funds. He might have known that the dividends arising from the stock were from time to time received by Mr. Mills; knowing that, he might nevertheless have full reason to believe that they were duly applied, according to the trusts and directions of the will, in satisfaction of the annuities, or of the rent of the leasehold estate possessed by the testator at his death, and which was payable out of the whole estate. The argument for the plaintiffs proceeds upon this, that you are to impute to Mr. Nixon a knowledge of all that he might have known. It is said he proved the will, and must, therefore, have known its contents, and what was to be done in pursuance of the trusts; this is a presumption which I think the law itself will draw, and he must therefore be taken to have known the contents of the will;[3] then it is argued, that on proving the will,

[1] "Each and every executor has, in himself, the entire power to dispose of all the property which they take as such by virtue of their office—there are no parts or moieties between them—as they all represent the testator, and fill one office—they are but as one person in the eye of the law." *McCoon, V. C.*; *Hertell v. Van Beuren*, 3 Edw. Ch. Rep. 35. See also S. C. 4 Hill, 492. 9 Paige, 52. *Edmonds v. Crenshaw*, 14 Peters, 166. 2 Story's Eq. 1280, a.

[2] As to the liability of one executor, by acquiescence, for the misapplication or breach of trust of his co-executor, see further *Edmonds v. Crenshaw*, 14 Peters, 166. *Davis v. Spurling*, 1 Russ. & M. 64, 66, n. 1. S. C. Taml. 199. *Sutherland v. Brush*, 7 Johns. Ch. Rep. 22. *Clark v. Clerk*, 8 Paige, 153. *Booth v. Booth*, 1 Beav. 126. *Lenoir v. Winn*, 4 Desau. 65. *Sparhawk v. Administrator of Buel*, 9 Vermont Rep. 41. 2 Story's Eq. § 1280—1284. *Lloyd & G.* 122, n. a.

[3] So, a trustee will be presumed to be cognizant of facts relating to his trust. *Wynne v. Wynne*, 2 Keen, 789, 794.

 1840.—Eyre v. Hanson.

he was bound to make a statement upon oath respecting the value of the property, and therefore became acquainted with the particulars. He might have had some knowledge of it to the limited extent which can be known on such occasions; but I cannot impute to him a knowledge of the exact state or amount of the property or of the claims upon it, or the clear amount of the balance in the hands of his co-executor. I certainly do not recollect any case, in which the principle has been carried to the extent to which it has [*477] been here pressed; and if in this case I were to charge Mr. Nixon generally with all the assets received by his co-executor, I must in every other case say, that an executor who does not personally act, and who having no reason to suspect any misapplication by his co-executor, permits him to act alone, is liable for every misapplication committed by his co-executor: I do not think I can lay down any such rule.

With respect to the 450*l.*, he is clearly liable; whether he is discharged from it may be a question. It will be for him to show that this money was applied towards the payment of the debts owing from the testator's estate; and upon doing that, then, according to the cases which have been cited of *Lord Shipbrook v. Lord Hinchinbrook* and *Underwood v. Stevens*, he will be discharged in respect of this sum. I do not think this satisfactorily appears, because the Master has not reported it, but if it is desired, I will grant an inquiry.

Mr. *Bethell* asked for the costs, out of the fund, of the assignees, or, at least, of the official assignee, who was a formal party, having no interest. The bankrupt's estate had been exhausted.

Mr. *Pemberton*, contra. The official assignee does not appear separately from the creditor's assignee.

THE MASTER OF THE ROLLS:—If Mills had been solvent he would have had all the costs to pay. The assignees might have made a reservation of funds out of the bankrupt's assets to meet the costs. I think they cannot have their costs.[4]

[*478]

*EYRE v. HANSON.

1840: May 27, 28.

In a foreclosure suit, an order to enlarge the time for payment of the mortgage money, is by no means of course, but may be refused, where no excuse for the default is stated, and the security does not appear to be ample.

The usual condition on which it is granted is, on payment of interest and costs before the time appointed by the Master for payment of the whole; in this case, however, it was ordered, that upon payment of the interest and costs within a month, the time should be enlarged for five months.

[4] In a creditor's suit, the assignees of a bankrupt, who is a defaulting executor of the deceased debtor, are not entitled to their costs of suit out of the testator's estate; but if the plaintiff sought to charge the assignees with the receipt of specific parts of the testator's estate, and failed to do so, the assignees might be entitled to costs. *Massey v. Moss*, 1 Hare, 319.

 1840.—*Fyre v. Hanson.*

THE plaintiff, the mortgagee of some property belonging to the defendant, filed his bill of foreclosure in June, 1837; the ordinary decree was made in June, 1839, and the accounts, &c., were referred to the Master. On the 4th of December, 1839, the Master reported, that on the 4th of June, 1840, the sum of 11,921*l.* would be due to the plaintiff, and he appointed that time for payment; and in default, that the defendant should be foreclosed.

It was now moved for the defendant, that it might be referred back to the Master to compute subsequent interest and costs, and that the defendant might have six months further time to pay what might be reported due. The application was supported by an affidavit, stating that the defendant had used his best endeavors to find a person who would take an assignment of the mortgage, and to sell the estate, but without success. That the summer was the best time to sell the property; that the estate had cost nearly 22,000*l.*, and that the defendant had laid out 4000*l.* in improving it; and that it was of the utmost importance for the defendant and his family, that some further time should be allowed to him for payment, so as to enable him in the mean time to take advantage of the summer season for the disposal of his said estate.

On behalf of the plaintiff it was represented, that the estate was not of much greater value than between 13,500*l.* and 14,500*l.*, and it was proved that no interest had been paid since September, 1836.

*Mr. *Treslove* and Mr. *Harwood*, in support of the motion, cited [**479*] *Edwards v. Cunliffe*,^(a) and contended that it was of course to grant this, the first, application.

Mr. *Pemberton* and Mr. *M'Donnell*, contra.

THE MASTER OF THE ROLLS:—The order to enlarge the time for payment of what the Master has found due on the mortgage is by no means of course: in *Nanny v. Edwards*,^(b) the application was refused, as it may be in any case where no excuse for the default is stated and the security does not appear to be ample.

When the indulgence is granted, it has frequently been for six months on the first application; but this must depend on the circumstances, according to which a time greater or less may be granted.

The condition on which the order is usually granted is payment of the interest and costs reported due, on or before the time appointed by the Master for the payment of the whole; as was the case on the first order for enlargement which was made in *Edwards v. Cunliffe*.^(c) In that case the Master's report was made on the 23d of June, 1814, the time appointed for payment was the 23d of December, 1814, being six calendar months from the date of the report. On the 10th of the same month, being only thirteen days before the expiration of the time, an application was made to enlarge it, and an en-

(a) 1 Mad. 287.

(b) 4 Russ. 124.

(c) 1 Mad. 287, and see 2 Keen, 212.

1840.—*Lichfield v. Baker.*

largement for six months was made, on payment of the interest and [*480] costs on or before the 23d of December, 1814; *that is, on or about the expiration of the time limited by the Master for the payment of the whole. If this order were followed as a precedent, the order to be now made would be to enlarge the time on payment of the interest and costs on or before the 4th of June next, an order which it might be difficult for the defendant to avail himself of.

But there are cases where a different form of order has been adopted; and under the circumstances of the present case, I think it will be proper to order, that on the defendant paying to the plaintiff the sum of 1921*l.* 15*s.* 4*d.*, the amount of the interest and costs reported due to the plaintiff, within a month, the time for redemption may be enlarged for five months. To this must be added the clause which was added in the case of *Edwards v. Cunliffe*, that in default of the defendant's paying to the plaintiff the sum of 1921*l.* 15*s.* 4*d.* by the time aforesaid, the defendant is to stand absolutely foreclosed.[1]

[*481]

**LICHFIELD v. BAKER.*

1840: May 8, 9.

A testator possessing long annuities and money in different funds, bequeathed the residue of his estate to A. for life, and after her death he gave certain stock legacies, and whatever there might remain, to B.: Held, that the long annuities ought to be converted for the benefit of the parties in remainder.

A perishable fund was for some time wrongfully enjoyed in *specie* by the tenant for life; the remainder man filed a bill for an account, and to ascertain the residue. Before filing the bill, the plaintiff had notice that part of the residue consisted of long annuities, and he was again informed of that fact by the answer; but he made no objection thereto, either by the original or the amended bill, and at the hearing the common decree for an account was made. The Master declined entering into the question of the right of the tenant for life to enjoy the long annuities, but he stated the fact on his report. The report was confirmed, and by consent no exceptions were taken: Held, on further directions, that the long annuities must then be converted into consols; but the court refused to make the widow account for her prior receipts.

THE testator, who was possessed of several sums of consols, three per cent. reduced, new three and a half per cents. and long annuities, by his will, after bequeathing several sums of consols, three per cent. reduced, and new four per cents. proceeded, "and *as to all the rest, residue, and remainder of my estate*, whatsoever and wheresoever it may be, whether real or personal, and not herein given and disposed of, after payment of my debts, legacies, &c., I do hereby give and bequeath the whole to my wife Elizabeth

[1] As to granting a mortgagor, after a decree of foreclosure, further time for payment; see an earlier case, *Jones v. Creswicke*, (1840,) 9 Sim. 304. Also *Geldard v. Hornby*, 1 Haro, 251; stated 9 Sim. 319, n. 1. As an analogous case, see *Astor v. Romayne*, 1 Johns. Ch. Rep. 310, cited by the Editor, in the same note. That interest in such cases is only to be calculated on the amount of principal, and not on the aggregate of principal, interest and costs, see *Brewin v. Austin*, 2 Keen, 211. *Wilkinson v. Charlesworth*, ante, 470.

 1840.—*Lichfield v. Baker.*

Baker, to and for her own use and benefit during her life ;” and after her decease he then bequeathed several other legacies of stock in consols and three per cent. reduced, and proceeded thus :—“ *And whatever there may be remaining* after the above mentioned divisions have been made, I give and bequeath the same to my brother and sister, viz. the Rev. Robert Baker and Isabella Lichfield Baker during their lives, to be equally divided between them, and after the death of either of them, I give the whole to the survivor during his or her life, and after the death of both, I bequeath to my brother’s wife, Sarah Baker, 500*l.* stock in the new four per cent. annuities for ever, and the remainder to my two cousins above mentioned, viz. *John Read Lichfield and Coventry Lichfield, to be divided equally between them.”

*The testator appointed Mr. Roberts and Elizabeth Baker his ex- [*482] cutors, and he died in 1824. Mr. Roberts alone proved the will, and died in 1832. Elizabeth Baker, the widow, thereupon proved the will of the testator.

It appeared that part of the testator’s estate consisted of a sum of 80*l.* long annuities, and that moneys in the funds had been sold to pay the debts, &c., leaving the long annuities untouched, the proceeds of which, during Mr. Roberts’ life, had been paid by him to Mrs. Baker, the first tenant for life ; that after Mr. Roberts’ death, the long annuities were received and retained by Mrs. Baker.

In February, 1837, before the institution of this suit, the solicitor of the plaintiffs John Read Lichfield and Coventry Lichfield, who were entitled in remainder, were informed of the state of the residuary estate, and that part of it consisted of 80*l.* long annuities.

In June, 1837, John Read Lichfield and Coventry Lichfield filed this bill for an account of the estate of the testator, but which contained no allegation or prayer in respect of the long annuities. The defendant, Mrs. Elizabeth Baker, put in her answer, and again stated that part of the residuary estate consisted of long annuities. The plaintiffs amended their bill, but made no addition in respect of the long annuities ; and in March, 1838, the common decree was obtained to take the accounts and ascertain the residue.

The Master, to whom the matter was referred, by his report dated the 31st of May, 1839, amongst other things stated, that in proceeding on the several accounts of the payments and disbursements made by the executor, *William Roberts, in his lifetime, and of the said Elizabeth [*483] Baker, the surviving executrix, since his decease, the plaintiffs had objected before him to the allowance of the payment of the annual income of 80*l.* bank long annuities therein mentioned, and which payments were stated to have been made, by William Roberts, during his lifetime, to Elizabeth Baker, and since his death retained by her, under the bequest contained in the testator’s will of his residuary property to the defendant Elizabeth Baker for life ; and that the plaintiffs who were entitled to the ultimate residue of the testator’s personal estate had contended before him that the de-

1840.—*Lichfield v. Baker.*

fendant, Elizabeth Baker and William Roberts were not justified in applying to the use of the former the income of the said terminable annuities, but that the same ought to have been sold, and the produce thereof in part applied in payment of the testator's debts, funeral and testamentary expenses, and the residue thereof invested in the purchase of three per cent. consolidated annuities, as a permanent fund to answer the trusts of the testator's will, instead of a sale of part of the testator's three per cent. reduced annuities for the payment of his debts, funeral and testamentary expenses, as thereinafter mentioned. That it appeared to him, that under the terms of the decree, he had no authority to consider the plaintiff's objection, but had stated that the claim had been made before him; and he found that the clear residue then consisted of certain sums, consols, reduced, new three and a half per cents., and 80*l.* long annuities.

By arrangement between the parties no exception was taken to the report which had been confirmed, and the cause now came on for further directions.

Mr. *Kindersley* and Mr. *Rogers* for the plaintiffs, contended that the long annuities, being a perishable fund terminable in 1860, ought to have [*484] been converted at the death of the testator, and invested in consols for the benefit of those entitled in remainder; that the widow, who had received the dividends, ought now to account for them or make good the stock which would have been purchased with the produce of the long annuities, if sold upon the death of the testator. *Mills v. Mills*, (a) *Bethune v. Kennedy*, (b) *Vincent v. Newcombe*; (c) Secondly, they contended, that if the bill had been filed immediately after the death of the testator, the long annuities would have been ordered to have been converted and invested in consols; and that the widow, who had received more than she was entitled to was now bound to account for it, and that by means of some inquiry or otherwise the matter ought now to be set right; that it had been agreed that no exceptions should be taken to the report, and that the plaintiffs, were not in a condition to take exceptions, as the Master had no authority, by the decree, to enter into the question; and as upon a bill for an account, the plaintiff was not at liberty to enter into evidence, *Law v. Hunter*, (d) the question could not have been raised at the original hearing; that the plaintiff was not bound to give credence to the statement of the defendant as to the state of the fund, besides which the information furnished by the letter previous to the filing of the bill did not state that the widow was in the receipt of the whole annual produce of the long annuities; that all the circumstances now appeared on the report, and the court would decide the question, notwithstanding there were no exceptions to it, *Adams v. Claxton*, (e) or give liberty to the party to file another bill on the subject.

Mr. *Beavan*, for Isabella Lichfield Baker, the second tenant for [*485] life, did not argue the first point, as it was doubtful which con-

(a) 7 Sim. 501.

(b) 1 Myl. & Cr. 114.

(c) 1 You. 599.

(d) 1 Russ. 100.

(e) 6 Ves. 225.

1840.—*Lichfield v. Baker.*

struction would be most beneficial for the second tenant for life; but he contended, that if the court were to hold that the long annuities ought to be converted, then that the parties in remainder ought to have the benefit of the conversion as from the death of the testator; that a decree for an account enured to the benefit of all parties, both plaintiffs and defendants; and that any error of pleadings or conduct on the part of the plaintiffs ought not to be allowed to prejudice the rights of the defendants; and that notwithstanding there were no exceptions, the court would not now continue the error, which was manifest upon the face of the report.

Mr. *Bethell*, for the representatives of Mr. Roberts.

Mr. *Pemberton* and Mr. *Elderton*, for the widow, argued, first, that it was manifest from the fact of the testator having given legacies of the three per cent. consols, three per cent. reduced, and four per cents., after the deaths of the first and second tenants for life respectively, that he did not intend any alteration to be made in the state of the property upon his death; that it was plain that the testator could never have intended the four per cents. to be converted into consols at his death, and to be reconverted into four per cents. at the death of the tenant for life, but must have wished his wife to enjoy the four per cents. as they were on his death, and a part of them to be transferred to the particular legatee on the death of the tenant for life; and that a similar intention must consequently be inferred as to the long annuities. They cited *Pickering v. Pickering*.(a)

Secondly, that the plaintiffs were not entitled to any relief as to the long annuities, there being no questions *as to them raised upon [*486] the record; that the plaintiffs had express notice, before the institution of the suit, by the letter of February, 1837, of their existence as part of the residuary estate; that they concurred in the payment of the dividends to the widow, by Mr. Roberts, in his lifetime, and in the receipt by the widow since his death; that the plaintiffs were again informed of the circumstance by the defendant's answer, and the bill had afterwards been amended, yet no charge had been introduced on this subject; no such point had been raised by the bill, and no opportunity given to the widow to meet it; again when the decree was taken, the conduct of the executor had never been challenged; they contended, therefore, that the parties had concurred and assented to the receipt by the widow of the long annuities, and that they could not now have any relief in respect of them.

THE MASTER OF THE ROLLS:—The only point on which I need call on the plaintiffs' counsel to reply, is on the extent of relief now to be granted. As to the other question, I take this to be the rule of the court, that when a testator has given an estate, or the residue of an estate, to persons in succession, as to one for life, with remainder to another person; the court, presuming that the testator intended the remainder man should have something, will so deal with the property, if it be a property that is wearing out and may ter-

(a) 2 Beav. 31, and 4 Myl. & Cr. 289.

 1840.—*Lichfield v. Baker.*

minate during the life estate, as to secure the accomplishment of that intention, and give the remainder man something ; for that purpose it will convert the perishable into a permanent property, and give the income which arises from it to the persons entitled for life in succession, and preserve the capital for the person entitled in remainder. That is the rule ; and the court only acts upon the general intention of the testator, that something should [*487] be given to the person *who is the donee in remainder ; but if, upon the construction of the will, it appears the testator had another intention, that is to say, an intention to give to one or more persons who are to take for lives or during a succession of lives, the enjoyment of the property in the state he left it at the time of his death, then the court will carry that intention into effect ; and every one of the cases which have been cited, and every case which can arise, will turn upon this question of construction, whether you can find upon the face of the will, an intention that the legatee for life shall enjoy the property in the way in which it stood at the testator's death, even to the extent of defeating the testator's intention to bequeath something to the remainder man. I believe that in all the cases which have been cited in opposition to the conversion, there have been words clearly indicating, from the testator's description of the property or some other circumstance, that the testator intended the donee to enjoy it for life, in the same way as it stood at his death.

Having attended to this will and read it carefully over, and having attended to the ingenious argument by which it has been attempted to be shown that the intention was that the donee for life was to enjoy it as it stood, I think that there is not enough in this will to except this case from the general rule.[1] With respect to the sort of decree to be made, I must hear counsel in reply.

Mr. *Kindersley*, in reply, on the second point, as to the extent of relief to be granted.

THE MASTER OF THE ROLLS :—If I am now to make the decree, that is just between the parties, the only one I can make is founded on this : [*488] The Master having *ascertained that the 80*l.* long annuities is part of the residue, and it appearing to be a perishable property, it ought to be sold and converted into three per cents. I do this on the ground that the plaintiff, by his bill and by his conduct, has made no complaint whatever of the prior application of the income arising from the long annuities.(a)

NOTE.—On appeal and cross appeal, the Lord Chancellor, on the 25th November, 1840, affirmed this decision as to the conversion, considering the stock legacies as general and not specific, but he ordered the widow to account for the long annuities from the death of her co-executor in 1832, when she first proved the will, and acted in the execution of the trusts.

(a) See *Garland v. Littlewood*, 1 Beavan, 527.

[1] Vide ante, 57, n. 2. *Goodenough v. Tremamondo*, post, 512.

 1840—Day v. Croft.

DOW v. CROFT.

1840: April 1; May 12, 14.

The allowance to a receiver appointed by the court depends on the degree of difficulty or facility experienced in the collection. There is no general rule as to the amount.

The report of the Master allowing to the receiver a gross salary of five per cent. on considerable receipts, composed of large sums, due from mortgages, annuities, rents, &c., referred back for review.

THE principal object of this petition was to have it referred back to the Master, to review his report as to the allowance made by him to the receiver in the cause, who had been appointed to get in the personal estate of the testator Charles Day; and it prayed in the alternative that, if necessary, the petitioners might be at liberty to take exceptions to the Master's report.

In February, 1839, Mr. Scott, a London banker, was appointed receiver of the testator's estate; and he was directed to pass his accounts half-yearly, on or before the 15th of November and the 15th of May in every year, or at such other time as the Master might from time to time direct or appoint.

*By the first half-year's account, which was brought into the Mas- [*489] ter's office in November, 1839, it appears that he had received from the 1st of March, 1839, to the 15th of November, 1839, the sum of 20,281*l.* consisting, as to one half part, of principal money paid in discharge of mortgage debts and for the redemption of annuities: of about 7000*l.* for interest on mortgages and annuities, and of about 3000*l.* received for the rent of leasehold estates. The Master allowed the receiver, on passing his accounts, the sum of 1014*l.* 0*s.* 2*d.*, for his trouble, being at the rate of 5*l.* per cent. on 20,881*l.* 19*s.* 9*d.* the full amount of all his receipts; he directed the balance to be paid into court before the 29th of February, 1840, and which was done by the receiver on the 22d of February.

It appeared that there was still considerable outstanding estate, of which a sum exceeding 100,000*l.* was due on mortgages, some being of a very large amount.

Another subject of complaint contained in the petition was, that the receiver had had in his hands from the month of March, 1839, large balances varying from 3000*l.* to 15,000*l.*, and particularly a balance of 13,692*l.* from November, 1839, when he brought his account into the Master's office, to the 22d of February, 1840, when it was paid into court; but the petition prayed nothing in respect to this point, and no evidence was given of any profit having been made by the receiver, from retaining such balances.

Mr. Girdlestone and Mr. Hallett, in support of the petition, contended, that the Master had allowed an extravagant remuneration to the receiver for his receipt of gross sums, which had been paid over without any *trouble, and that not only as to the past but as to the future re- [*490] cepts, some means ought to be adopted for protecting the estate from the great expense of the receiver.

1840.—Day v. Croft.

That the objection to the Master's report was to the principle on which he had proceeded, and not to particular items, and that therefore, as in the case of a taxation of costs, it was open to review. *Shewell v. Jones*,^(a) *Fenton v. Crickett*,^(b) *Alsop v. Lord Oxford*;^(c) that in *Wildridge v. McKane*,^(d) receivers' accounts were ordered to be reviewed from the beginning.

They argued, that by the rules and practice of the court, a receiver who did not regularly account and pay in his balances, was liable to be charged with interest on the money in his hands, and to be deprived of his salary, *White v. Lady Lincoln*,^(e) *Potts v. Leighton*,^(g) *Fletcher v. Dodd*;^(h) that he could make no profit from the moneys received by him, but was accountable for it, *Shaw v. Rhodes*,⁽ⁱ⁾ *The Earl of Lonsdale v. Church*,^(k) *Massey v. Davies*;^(l) and that as to the gross sums which parties were willing to pay, they might be paid into court at once without passing through the hands of the receiver, and thereby the poundage would be saved; *Haigh v. Grattan*;^(m) they also cited *Malcolm v. O'Callaghan*,⁽ⁿ⁾ and the sixty-third general order of 1828.^(o)

[*491] *Mr. Tinney, Mr. Pemberton, and Mr. Purvis for the plaintiffs; and Mr. Richards and Mr. Bagshawe for the receiver, opposed the application.

Mr. G. Turner, Mr. Stewart, Mr. Terrell, Mr. Prendergast, Mr. C. P. Cooper, Mr. Bethell, Mr. Glasse, Mr. Witham, Mr. Toller, Mr. Russell, and Mr. Kindersley for other parties.

THE MASTER OF THE ROLLS considered that no case had been made out against the receiver, as to the retainer by him of large balances, but he reserved his judgment on the other point.

May 14.—THE MASTER OF THE ROLLS:—Various representations having been made at the bar, as to the principle and the practice adopted in the offices of the different Masters in respect of receiver's allowances, I thought it right, before disposing of the case, to inquire of the Masters what were the principles upon which they acted, and the practice adopted on this point in their several offices. The Masters have each of them been good enough to furnish me with a certificate: and I find that there is no general rule, which universally prevails as to the allowance to a receiver. Where the receipts consist of rents of freehold and leasehold estates, 5*l.* per cent. upon the amount received is most frequently allowed. If there be any special difficulty in collecting the rents, on account of the sums being extremely small, or of the payments

(a) 2 S. & S. 170, and 3 Russ. 522.

(b) 3 Mad. 496.

(c) 1 Myl. & K. 564.

(d) 2 Molloy, 545.

(e) 8 Ves. 371.

(g) 15 Ves. 273.

(h) 1 Ves. jun. 85; General Order of 23d April, 1796, in 15 Ves. 278.

(i) 2 Russ. 539.

(k) 3 Bro. C. C. 41.

(l) 2 Ves. jun. 317.

(m) 1 Beavan, 201.

(n) 3 Myl. & Cr. 52.

(o) 2 Russ. app. 22. [p. 651, of this ed.]

1840.—Day v. Croft.

being very frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then less than 5*l.* per cent. is allowed. One of the Masters has certified *to me a case, where, after consideration, he allowed only 4*l.* per [*492] cent. for the receipts of rents and profits of freehold and leasehold estates. Another Master has certified to me a case, in which the sum paid to the receiver amounted to 300*l.* a year for the first year; the receiver was afterwards allowed 150*l.* only for a succession of years, which was afterwards reduced to 50*l.* a year, for the receipt of the same rents; it cannot therefore be considered as an universal or general rule, that 5*l.* per cent. should be allowed even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection. -

With respect to other receipts, each Master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed 2½ per cent., but for gross sums of money this has been very much reduced, and 1½ per cent. has been allowed upon many occasions. It appears, therefore, that the Masters, as they ought, consider upon each occasion, what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver.

The Master, whose report is sought to be reviewed, informed me, that at the time this matter was before him, an objection was made to the amount of the allowance which he had awarded, but that the particular circumstances, and the particular nature of the items, were not brought to his attention; the consequence of which was, that having nothing to induce him to depart from the common rule of 5*l.* per cent., he allowed it.

Under all these circumstances, there being about 1000*l.* allowed to the receiver, for receiving these sums *of money consisting of large [*493] sums paid for mortgages, for redemption of annuities, for interest upon mortgages, and for annuities: and the Master not having had the opportunity of considering what ought to be allowed in this particular case: I think there is no doubt that I ought to refer it back to him, to review his report. The petition, therefore, in this respect succeeds. There are very many parties in this cause, who appeared (I cannot say improperly) to defend the Master's report; they must have their costs of the application.

 1840.—Webb v. Webb.

WEBB v. WEBB.

1840 : May 14.

Where a testator directs the accumulation of a fund to commence at a time subsequent to his decease, the accumulation becomes void at the expiration of twenty-one years from his decease, although at that period there has been on the whole less than twenty-one years of accumulation.

A testator gave annuities to A. and B respectively charged on money in the funds; and he directed that when either died, the annuity should accumulate until the death of the survivor.

A. died some time after the testator; B. being still living: Held, that the accumulation must cease at the expiration of twenty-one years from *the testator's decease*, and not from twenty-one years from the decease of A.

THE testator in this case gave annuities of 400*l.* a year to Ann Webb, and 70*l.* a year to William Adams during their respective lives, which he charged on his money in the consols; and he then declared the trusts of the residue of his money in the consolidated bank annuities, after providing for the annuities, in the following terms.

"And it is my will, that as and when each of them the said Ann Webb and William Adams shall respectively die, the annuity and annuities so given by me, to or for her or him respectively as aforesaid, shall be laid [*494] out *from time to time, until the death of the last survivor of them the said two last named several annuitants, as an addition to the said capital of the said rest, residue, and remainder of my said stock of the three per cent. consolidated bank annuities, and all such additional stock, and the interest and dividends of the same, shall be and be taken as an increase and accumulation to the said capital stock, until the death of the last survivor of them, the said two last above named annuitants; and from and after the several deceases of the survivor of the said two annuitants, namely, the said Ann Webb, widow, and William Adams, and full payment of their several annuities hereinbefore given and directed to be paid to them, then upon trust, that the dividends, interest, and annual proceeds of the said rest, residue, and remainder of any said capital stock of the three per cent. consolidated bank annuities, and the dividends and proceeds of all such accumulations as shall or may have been up to that time made as aforesaid, shall be paid unto and equally divided between the said Ann Webb, John Webb, Thomas Stallard Webb, William Webb, Sarah Jackson Venn, the wife of the said John Venn, James Alden Webb, and George Webb, the seven children of my said late deceased brother William Webb, and their respective assigns for and during the term of their respective natural lives," with remainder to their respective children. The testator gave the remainder of his personal estate not already disposed of, to his said seven nephews and nieces.

The testator died on the 3d of March, 1813, leaving Ann Webb and William Adams surviving him. At his death he was possessed of a sum of 43,000*l.* consols, and under an order of the court made in this cause a sum of consols had been set apart to answer the two annuities of 400*l.* and 70*l.*

1839.—*Stubbs v. Sargon.*

*W. Adams died some time after the testator, and the sum set [*495] apart to answer his annuity was allowed to accumulate. Ann Webb was still living; and the question which arose upon this petition was, whether the accumulation of the sum set apart to answer Adams' annuity should cease on the 3d of March, 1834, under the Thellusson act, (40 G. 3, c. 98,) or continue twenty-one years from the death of the annuitant Adams.

The petitioners, the nephews and nieces, insisted that the accumulation ceased on the 3d of March, 1834, and that the subsequent dividends fell into the residue, and belonged to them, and by this petition they prayed for a declaration in conformity therewith, and for payment.

Mr. *Pemberton* and Mr. *Steere*, in support of the petition, referred to *O'Neill v. Lucas*.(a)

Mr. *Bethell*, contra, made two points: first, he contended that the intention of the Thellusson act was merely to prevent an accumulation for more than twenty-one years; that where, therefore, the accumulation did not commence at the death of the testator, it might still continue for twenty-one years from its commencement, though more than twenty-one years from the death of the testator; and secondly, that the testator had placed himself in *loco parentis*, and that the case came within the exception contained in the second clause made in favor of accumulations for raising portions for any children of any settlor or devisor: (b) he cited *Shaw v. Rhodes*.(c)

*THE MASTER OF THE ROLLS said that if a testator died in 1820, [*496] he could not dispose of the interest of his property until 1840, and then direct the capital and subsequent interest to go on accumulating until 1861; he must, therefore, make an order in conformity with the prayer of the petition.[1]

STUBBS v. SARGON.

1839: November 23.

The court declined taking the consent of a married woman, who was a minor, to the payment out of court of money to which she was entitled.

Affidavits used in the Master's office ought to be regularly filed like other affidavits.

A MARRIED lady who had not attained the age of twenty-one, being entitled to a sum of money in court, petitioned to have the same paid out to her husband, and she attended in court for the purpose of being separately examined and consenting thereto.

Mr. *Walker*, in support of the petition, relied on *Gullin v. Gullin*,(d) where a similar order had been made; but

(a) 2 Keen, 313.

(c) 1 Mylne & Craig, 135.

[1] Vide *Pride v. Fooks*, ante 441.

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(b) See *Eyre v. Marsden*, 2 Keen, 573.

(d) 7 Simons, 236.

 1840.—*Nicholson v. Peile*.

THE MASTER OF THE ROLLS said he felt great difficulty in acting upon that authority, and declined making the order.[1]

In the same cause an order had been made, supported by affidavits which had been deposited in the Master's office, but had not been filed. It was said that in practice this was held equivalent to filing them.

THE MASTER OF THE ROLLS :—There is a general order of the [*497] court, which directs that no order shall be drawn *up by the Registrars until the affidavits on which it is founded have been filed.(a) This application is founded on affidavits in the Master's office, which have never been filed, and the order cannot be drawn up until that has been done. Whatever may be the custom, I think that the Masters ought not to make reports on affidavits which have not been previously regularly filed.

NICHOLSON v. PEILE.

1840: May 13.

A plaintiff submitted to a demurrer, and obtained an order of course to amend, undertaking to amend within three weeks; he did not comply with the undertaking, but after the expiration of the three weeks, obtained a second order of course to amend upon similar terms. No answer having been filed: Held, that the second order was not irregular.

THE defendant Peile filed a general demurrer to the plaintiff's bill, and set it down for argument, whereupon the plaintiff, before argument, submitted to the demurrer, and on the 2d of April obtained an order of course for liberty to amend, upon payment to the defendant Peile of 20s. costs in respect of the amendment, and the costs of the demurrer, and without costs as to the other defendant, amending her office copy, "the plaintiff undertaking to amend the bill within three weeks."

The costs were taxed, and paid on the 1st of May; but the plaintiff did not amend his bill within the three weeks, which expired on the 24th of April. On the 29th of April, he obtained, as of course, a second order to amend similar in terms to the first. No answer had been filed.

It was now moved on behalf of the defendant Peile, that the second order might be discharged with costs for irregularity. The affidavit in opposition [*498] stated, *that immediately on the first order being obtained, instructions were laid before counsel to amend the bill, but that owing to other engagements, the amended bill was not obtained from him

(a) See Wy. Pr. Reg. S., Beame's Orders, 149, 307.

[1] As to the inability of an infant *femme covert* to bind herself, or her property, see *Sanford v. McLean*, 3 Paige, 117. *Udall v. Kegy*, 3 Cow. 590. As to separate examination of *femme covert*, by, or by the direction of, the court: *Cooke v. Fryer*, 4 Beav. 13; *In the matter of Stuart*, 1 Edw. Ch. Rep. 173; *Whitall v. Clark*, 2 Edw. Ch. Rep. 149. See further, *Johnson v. Johnson*, 1 Keen, 648, 654. *Rose v. Rolls*, 1 Beav. 270, 271, n. 1.

1840.—*Nicholson v. Peile.*

until the day after the expiration of the three weeks mentioned in the first order which was the reason of the default in not amending within the time.

Mr. George Turner for the motion :—The plaintiff having failed in the performance of his first undertaking, had no right to get a second order as of course giving him further time to amend, otherwise, by obtaining a series of such orders, a defendant might be indefinitely delayed, without the possibility of relieving himself therefrom, as he could not put in an answer pending an order to amend. A demurrer being put in, the plaintiff has submitted to it, and on certain terms he has been allowed the indulgence of amending his bill; he must strictly comply with his undertaking, and upon his default, either the demurrer ought to be considered as allowed, or the defendant ought to have the judgment of the court allowing it with costs.

Mr. Pemberton and *Mr. Koe*, contra :—By the thirteenth general order (1831),(a) the plaintiff has liberty, once only after an answer has been filed, to obtain an order of course to amend his bill; but by the fourteenth order (1828),(b) there is no limit to the number of such orders of course, which he may obtain before answer; he must undertake, however, to amend within three weeks: this undertaking has reference only to the right of the defendant to move to dismiss for "want of prosecution. In ge- [*499] neral, a plaintiff obtains as many orders of course to amend as he pleases, provided no answer has been filed; and unless the demurrer in this case be considered an answer, the second order is not irregular. If the plaintiff had amended under the first order, he might (provided no answer had been put in) have obtained a further order of course to amend his bill, and he cannot be in a worse condition than he would have been in if he had amended imperfectly.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS :—I do not think I can grant this application. By the fourteenth order, the effect of not amending within the time is, that the order becomes void as regards a motion to dismiss for want of prosecution; so far the undertaking was intended for the benefit of defendants. This practice of obtaining several orders to amend as of course may be open to great abuse, and when abuse is discovered a remedy will be applied. The affidavit here shows that none was intended, and that the delay arose from counsel not having completed the amendments. I must refuse the application, but without costs.

(a) 1 Russ. & My. 769.

(b) 2 Russ. app. 9. [p. 642, of this ed.]

 1840 — *Morrice v. Swaby*

[*500]

*MORRICE v. SWABY.

1840: May 13, 14.

A defendant by his answer stated, that he had handed over some documents relating to the matters in question to his agent in Jamaica, to enable him to defend a suit there. That the agent had left the island, and that the documents had been taken possession of by a receiver appointed by the Court of Chancery there:

Held, that the admission entitled the plaintiff for an order for production; but liberty was given to the defendant to relieve himself, if possible, by affidavit from the effects of this admission.

THIS was a suit instituted in respect of a property in Jamaica.

The defendant, the executor, in his answer, after stating the institution of a suit in that colony in respect of the same matter, said, "that in order to enable his agent in the said island to render on defendant's behalf all such accounts as defendant was liable to render in respect of the testator's real and personal estate, he, defendant, sent to his said agent sundry books, accounts," &c., relating to the estate, "which were in defendant's possession." "That his said agent some time since left the said island without having returned to defendant the said books, accounts, &c., and that, therefore, the said particulars were taken possession of by a person who had been appointed receiver of the testator's real and personal estate, or some part thereof, by an order of the said Court of Chancery in Jamaica, made in the hereinbefore mentioned suit, and the defendant believed that the said several particulars were now in the said island of Jamaica."

He subsequently stated that he kept no list of the documents so sent to Jamaica, and that, save as appeared by the third schedule, he had not now, nor had he ever, in his possession, custody, or power, any document, &c., relating to the testator's estate, and that he had in the third schedule set forth the best list he was able of all such particulars, by the bill inquired after, as were then, or ever had been, in his possession, custody, or power.

[*501] The third schedule was as follows:—"An account book; an account current book; a journal and sundry accounts and vouchers which have been transmitted from time to time by this defendant to Jamaica; a bundle of vouchers, numbered 1 to 25 inclusive; sundry accounts and documents, numbered 26 to 32."

Mr. *Pemberton* and Mr. *Bagshawe* moved for the production of all the documents in the third schedule.

Mr. *Kindersley* and Mr. *Bazalgette* contended that no order for the production of the documents in Jamaica ought to be made, as there was no sufficient admission of their possession; *Farquharson v. Balfour*(a) was cited.

May 14.—THE MASTER OF THE ROLLS:—In *Farquharson v. Balfour*, which was cited, the defendant stated he had not papers in his power for a

 1840.—Dodd v. Webber.

reason which showed that they were. Here the effect of the answer is this, the defendant had the papers in his possession or power, and delivered them to his agent and they were taken out of the possession of the agent by another person whom the defendant calls the receiver. They are now in the hands of the same person, and from the latter part of the answer connected with the former, I must presume that they are now in the possession or power of the defendant. I think, however, from what is stated, that the defendant ought to have leave to remove the effect of this admission by affidavit. I must make the order for the production of those documents, unless the defendant satisfactorily shows by affidavit that the documents in question are so circumstanced as not to be in his possession, custody, or power.(a)

 *DODD v. WEBBER.

[*502]

1810 : March 25, May 9, 13.

Service abroad of a *subpœna* to appear, ordered under the 4 & 5 W. 4, c. 82, in a case where English funds were alleged to have been improperly sold out and invested in Austrian stock and Portuguese bonds.

The defendant having made default in entering his appearance, and the service of the *subpœna* and order having been properly authenticated, the court under the above act, ordered an appearance to be entered by the six clerk.

MR. ROUPELL moved *ex parte* that service of a *subpœna* in France upon one of the defendants residing there might be good service under the act of the 4 & 5 W. 4, c. 82.

The application was supported by affidavit, stating that the property which was the subject of this suit was a sum of 14,000*l.* consols, sold by the defendants, the trustees, and improperly invested in Austrian stock, Dutch government bonds, and Portuguese government bonds, and which were inscribed in the government books of the several countries; it stated[1] also that service of the *subpœna* might be authenticated by Her Majesty's consul at Paris.

THE MASTER OF THE ROLLS ordered, "That personal service, within three months, upon the said defendant at Paris, or at Charenton near Paris, all in the kingdom of France, of a *subpœna* to appear to and answer the plaintiff's bill returnable in three weeks from the time of such service, might be good service, upon such service being proved by affidavit to be sworn before Her Majesty's consul at Paris."

May 13.—The above order and the *subpœna* were served at Paris, but the

(a) *Parsons v. Robertson*, 2 Keen, 605. [606, n. 1. 1 Keen, 357, n. 1. In regard to the subject of the production of papers, by order of the court, the Editor can only refer to his remark in a note, to 1 Beav. 142, (n. 2.) It is believed that the editorial notes there referred to, contain either a statement of, or reference to, nearly all the more recent English decisions upon the subject; certainly, all which the Editor was aware of.

[1] Prayed. *Quære* ?

 1840.—KINDER v. Forbes.

defendant made default in entering his appearance; whereupon the service of the above order and of the *subpœna* at Paris having been properly verified by affidavit sworn before the British consul there, and the signature [*503] of the consul being also verified, it was "now moved *ex parte*, by Mr. Roupell, under the 4 & 5 W. 4, c. 82, that one of the clerks in court should enter an appearance for the defendant. He cited an unreported case of *M'Kellar v. M'Kellar*, before the Vice-Chancellor.

THE MASTER OF THE ROLLS granted the application, and ordered, "That Mr. Smith, one of the sworn clerks, do enter an appearance for the said defendant."

NOTE.—See 1 Daniel's Pr. 681, n. (c), and *Godson v. Cook*, 7 Sim. 519.

KINDER v. FORBES.

1840: April 23, May 16.

An order that service of a *subpœna* to appear and answer upon the defendant's partners at the house of business, the defendant himself being abroad, Held, under the circumstances to be regular.

THE bill in this cause was filed to set aside certain mortgage securities held by the defendant, and to prevent the further receipt by him of several annual sums comprised therein, amounting to 225*l.*, which, by an order made in another suit, had been directed to be paid to him by the receiver in that cause.

The defendant was a practising solicitor, in partnership with Messrs. Hale, Boys & Austin, in Ely Place, but he had gone abroad during the last year, and was at present in Italy, and had no dwelling house in this country. The transaction in respect of which this suit was instituted was not a partnership transaction, but the annual sums comprising the 225*l.* had been received for the defendant by his partners during his absence from the receiver.

The defendant's partners having declined accepting the service of the *subpœna* to appear and answer; the court on the 25th of March, 1840, [*504] on the motion of the plaintiff, "ordered, that service of a *subpœna* to appear and answer the plaintiff's bill on Messrs. Hale & Co., at Ely Place, should be deemed good service on the defendant.

The defendant having agreed to enter a conditional appearance with the Registrar, now moved to discharge the order.

Mr. C. P. Cooper and Mr. James Russell, in support of the motion:—The order which has been made *ex parte* is not authorized by the practice of the court; there are, it is true, two authorities in its favor, viz: *Carter v. De Brune*,(a) where service of a *subpœna*, on a person who transacted mat-

(a) 1 Dick. 39.

1840.—*Kinder v. Forbes.*

ters under a letter of attorney from the defendant, was ordered to be good service; and *Hyde v. Forster*,^(a) where an order was made directing service on the agent and factor in England of the defendant living abroad to be good service; but the authority of these cases was expressly denied by Lord Redesdale in *Smith v. The Hibernian Mine Company*;^(b) in that case a defendant residing out of the jurisdiction had given a power of attorney to P., to act for him in the management of his affairs, and the court refused to allow substituted service of a *subpœna* to appear and answer on P.; Lord Redesdale saying, "I think the legislature has decided this question: it has, in several instances, substituted service, an interference which would be wholly unnecessary if this court had power to do it."

Orders for such service have been refused in much stronger cases than the present: thus in *Bond v. The Duke of Newcastle*,^(c) where [*505] defendants were beyond the jurisdiction of the court, service of the *subpœna* on their clerk in court could not be allowed to be deemed good service, though they had, by their clerk in court, filed a bill relative to the same subject; so in *Roberts v. Worsley*^(d) the court refused to order service on the clerk in court in the original bill of a defendant out of the jurisdiction to be good service of the *subpœna* to appear and answer the same bill when amended; and in the case of cause and cross cause a like application has been refused; *Waterton v. Croft*.^(e)

Two acts of Parliament,^(g) have passed for enabling parties to serve *subpœnas* where the defendant is out of the jurisdiction, which would have been useless if this order be correct. The plaintiff, if at all, must proceed under those acts; and there is no suggestion that the defendant has withdrawn himself to avoid service.

Mr. Pemberton and Mr. Roupell, contra, contended that the order was regular; that by the practice of the court personal service of a *subpœna* was not necessary; for by the general rules of the court a *subpœna* is well served by leaving a copy of it and of the endorsement thereon at the dwelling house of the defendant, and producing the original writ to the person with whom the copy is left; *Davidson v. Marchioness of Hastings*;^(h) that here service had been directed at the defendant's office, which was equivalent to a service at the dwelling house of the party.

*That the present case did not come within the statute referred to, [*506] which, in practice, had been found to be a dead letter, as it did not provide for the steps to be taken consequent on the service of the *subpœna*.

Mr. Cooper, in reply:—The statute provides a remedy in the particular cases therein stated, but has not removed the inconvenience in other cases. The effect of substituting service is most harsh on a defendant; the writ is returnable in four days, and before any notice can be given to a defendant

(a) 1 Dick. 102.

(b) 1 Scho. & Lef. 238.

(c) 3 Bro. C. C. 386.

(d) 2 Cox, 389.

(e) 5 Sim. 502, and 678.

(g) 2 W. 4, c. 33, and 4 & 5 W. 4, c. 82.

(h) 2 Keen, 513.

1840 — *Kinder v. Forbes*.

of the existence of the *subpœna*, a sequestration may issue and his whole property may be seized.

May 16.—THE MASTER OF THE ROLLS:—In this case a motion was made to discharge, for irregularity, an order that service of a *subpœna* to appear and answer, on Messrs. Hale, Boys & Austen, at No. 6. Ely Place, Holborn, should be deemed good service on the defendant, John Hopton Forbes.

Mr. Forbes is a practising solicitor, carrying on business in partnership with Messrs. Hale, Boys, & Austen, in Ely Place. He is at this time abroad, and has not in England any dwelling house where service can be made according to the ordinary rule.

The question in the cause relates to the validity of a mortgage, the interest on which is payable to Mr. Forbes, under an order of this court made in the cause of *Bryan v. Twigg*; and during the absence of Mr. Forbes, the interest is received for his use by his partners who are here. The [*507] transaction in question is *not a partnership transaction; but for this purpose, the partners of Mr. Forbes are his agents.

The order is that service of *subpœna* on the partners who are such agents, or one of them, shall be deemed good service on Mr. Forbes.

Considering that Mr. Forbes is known to be a solicitor of very great respectability, it occasions no small surprise, in my mind at the least, that under these circumstances, he or those who act for him, should not appear to the bill, and obtain such time as may be necessary for him to put in a satisfactory answer.

He has chosen to adopt a very different course, and appearing to be well informed of what has passed, he has entered, or offered to enter, a conditional appearance with the Registrar, for the purpose of enabling him to move to discharge the order for irregularity. He says, that service on his agents or partners, at his place of business, is not a good service on him, and that he ought to be served personally in Italy, where he now is, under the authority of the recent acts made for that purpose. In other words, he says that, being a practising solicitor, now carrying on business by his firm in London, being now in Italy, but well knowing that process has been left with his partners at his place of business in London, he insists that his service shall go for nothing, and that the plaintiff shall be at the expense of pursuing him to Italy, and procuring him to be served there. It appears to me that this purpose cannot be attained even if he were successful in this application. One object of the bill is to restrain him from receiving money from a receiver of this court; no injunction is necessary, or even proper, for that purpose; [*508] an order upon the receiver would do justice in this *respect: and even if the present order could not be sustained, I conceive that an order for service on Mr. Forbes, himself, at his place of business, would be good.

1840.—Attorney General v. The Drapers Company.

But, considering the circumstances of this case in connection with some of the observations made by Lord Redesdale in the case of *Smith v. The Hibernian Mine Company*, and the order made by Sir John Leach in the case of *English v. Hendrick*,^(a) I do not think that the present order is irregular, and consequently, this motion must be refused.[1]

ATTORNEY GENERAL v. THE DRAPERS COMPANY.

1840: June 15, 12.

In every case where the general purpose of a gift or conveyance is declared to be charity, and the particular payments do not exhaust the whole fund, any surplus will belong to the charity, unless there are other circumstances from which a contrary intention of the testator can be collected.

THE facts of this case are fully stated in the judgment of the Master of the Rolls. It was argued by

Mr. Pemberton and Mr. Blunt, for the information.

Mr. Kindersley and Mr. Lloyd, Mr. Kyle and Mr. Foster, for the defendants.

THE MASTER OF THE ROLLS:—This is an information filed by the Attorney General against the Drapers Company, for the purpose of having it declared that the whole income of the property possessed by the company, under the will of Samuel Harwar, is applicable to the charitable purposes in the will declared.

*Having read the pleadings and the evidence, and attended to the [*509] argument addressed to me on behalf of the defendants, I am of opinion that the question depends upon the true construction and meaning of the testator's will, and that this construction cannot be affected by a letter which is said to have been addressed to the company by the testator some time before the date of his will, or by that which, under the circumstances of this case has, as it appears to me, been incorrectly called cotemporaneous usage. The company appears to have been unwilling to accept the trust so long as it was conceived to be likely to be burdensome, and to have accepted it only when it was thought likely that it might be accepted without loss.

The testator, by his will, dated the 28th of January, 1703, bequeathed to his executors 1700*l.*, in trust to lay out, with the advice of the overseers after named, 100*l.*, more or less, in the purchase of a piece of ground, &c., for

(a) 6 Mad. 205.

[1] Substituted service of a subpoena to appear was ordered in a creditor's suit, on one, who acting as attorney of the executor and general devisee and legatee resident in India, had obtained administration in England, and had entered into receipt of the rents of the real estate. *Weymouth v. Lambert*, 3 Beav. 333. As to substituted service of subpoena, see further, *The Earl of Chesterfield v. Bond*, ante, 263. *The People v. Craft*, 7 Paige, 326. *Hayden v. Bucklin*, 9 Paige, 512. 2 Keen, 513, n. 1.

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erecting twelve alms-houses, &c., and he directed that in building the same his executors should expend 400*l.*, or thereabouts, and should convey the same to the Company of Drapers for the habitation of three poor men and three poor women of the Drapers Company, and three poor men and three poor women of the parish where the alms-houses should be situate, &c.; and he directed that the remainder of the 1700*l.* should be laid out in the purchase of an estate of inheritance of 60*l.* a year or thereabouts, &c., to be conveyed to the Drapers Company, &c., for the maintenance and support of the six poor men and six poor women in the said alms-houses for ever, in manner following; that is to say, in trust that the court of assistants of the said company for the time being, by and out of the rents and profits of the said estate to be purchased, should from time to time monthly, by themselves or agents, pay and distribute to the said six poor men and six [*510] *poor women, or such number of them as should be in the said alms-houses, 6*s.* a-piece,^(a) and once every year to each of them a load of good coals; and upon a yearly visitation to each of them 1*s.* a-piece.

The question raised upon the construction of this will arises from this, that the testator, having stated that the conveyance was to be made to the Drapers Company for the maintenance and support of the alms-people in the alms-houses, refers to the manner of such maintenance and support, and then expresses a trust for payments which do not, as it is said, exhaust the whole income which he contemplated; and upon this the defendants contend that they are only bound to make the specific payments mentioned in the will, and having done so, are entitled to apply the surplus revenue to their own use.

That this cannot be so, as to the whole extent of the claim, appears to be clear, for by the will itself, no specific payment is directed to be made for the repairs of the alms-houses, and yet, as the testator intended the alms-people to be maintained in the alms-houses, he must have meant the alms-houses to be kept in repair out of the income of the purchased lands, and consequently, must have meant to charge the company with more than the specific payments. The agreement afterwards entered into by the company with the parish of St Leonard's Shoreditch, by which the latter agreed to keep the alms-houses in repair, could not have been in the contemplation of the testator, and the will must be considered as if the burden of the repairing had remained with the company. But besides this, it appears to me, from the words of the will, that as the maintenance and support of the alms- [*511] people in *the alms-houses is the expressed purpose for which the conveyance is directed to be made to the company, the mere circumstance that in describing the manner of maintenance and support, he has not (if the fact were so) exhausted the whole income, is not a sufficient reason for considering that any surplus was meant for the pecuniary benefit of the

(a) This would amount to 43*l.* 4*s.* a year only, while the present income of the charity property was 145*l.*

 1840.—Goodenough v. Tremamondo.

company. In the *Case of the Skinners Company*,^(a) though the gift was for the maintenance and continuance of the school, after appropriating or directing the payment of various fixed sums for specific purposes, the overplus was willed to the use of the company. In *Jordeyn's Charity*,^(b) whatever was left unspent was given for repairs, and for the profitable use of the Fishmongers Company; and in the *Case of Brazenose College*,^(c) there are many circumstances from which the intention of the testator to benefit the college was deduced; and I apprehend that in every case where the general purpose of a gift or conveyance is declared to be a charity, and the particular payments do not exhaust the whole fund, any surplus will belong to the charity, unless there are other circumstances from which a contrary intention of the testator can be collected.

In this case there do not appear to me to be any such circumstances; the general purpose of the conveyance to the company is charity. It does not appear that at the time of the testator's death, there was or could be an income which would have left any surplus, but whether this were so or not, I think, when the general purpose is thus declared, the reference to the mode of effecting the purpose, which does not exhaust the whole income, is not of itself sufficient to exonerate the trustee from applying the surplus, if any, to the general purpose.[1]

 GOODENOUGH v. TREMAMONDO,

[* 512]

1840: June 8.

A testator gave the residue of his estate and effects to trustees to permit the *rents*, interest, and annual proceeds to be received by A. for life, and after his decease to C. and D. when they attained twenty-one, with power after the death of A. to apply the *rents*, &c., towards the maintenance of C. and D. until their shares should become vested. Part of the residue consisted of leaseholds: Held, that the tenant for life was entitled to enjoy them in specie, and that they were not to be converted for the benefit of those in remainder.

FREDERICK ANDREE, by his will dated the 30th of January, 1822, after bequeathing some pecuniary and specific legacies, proceeded as follows:—
 “And as to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, I give, devise, and bequeath the same unto Anthony Angelo and Charles John Lawson, their executors, administrators, and assigns, in trust to permit the *rents*, issues, profits, interest, and annual proceeds thereof to be received and taken by my said son Richard Collier Andree, for and during the term of his natural life, for his own use and benefit; and from and after his decease, upon trust for Ann and Sophia, the two daughters of

^(a) 2 Russ. 407.^(b) 1 Myl. & K. 416.^(c) 2 Cl. & Fin. 295.

[1] Vide *In re the Rugby School*, 1 Beav. 463. *The Attorney General v. The Coopers' Company*, 3 Beav. 29, cited 2 Keen, 160, n. 1. 2 Story's Equity Jurisprudence, § 1181.

 1840.—Goodenough v. Tremamondo.

my said son Richard Collier Andree, when they shall attain the age of twenty-one years, equally to be divided between them share and share alike. And I empower my said trustees and executors, after the death of my said son Richard Collier Andree, to apply the *rents*, interest, profits, and annual proceeds of my said residuary estate and effects, for and towards the maintenance and education of the said Ann and Sophia Andree, until their respective shares shall become vested." And he appointed the said Anthony Angelo and Charles John Lawson executors of his will. The will was not executed so as to pass real estate.

The testator died shortly afterwards. Part of his property consisted of a leasehold house in Oxford street.

The bill was filed by an infant, who was entitled to the share of [*513] his mother Sophia Andree, afterwards *Sophia Goodenough, deceased; and prayed for the usual accounts,—that the residue might be ascertained,—and that it might be declared, that the leasehold premises ought to have been sold immediately after the said testator's decease, and the clear produce thereof invested in consols, and that the dividends of such bank annuities only, ought to have been paid to the tenant for life, and for consequential relief both against the trustees, and the tenant for life.

By the decree made in this cause on the 30th of May, 1837, it was referred to the Master to make the usual inquiries, and take the usual accounts and he found that part of the residue consisted of the leasehold house.

The cause now came on to be heard for further directions; the only question was, whether the leasehold house, the term in which had now only a few years to run, ought or not to have been sold at the testator's death.

Mr. Kindersley and Mr. Girdlestone, for the plaintiffs, contended that a sale ought to have taken place. That the general rule was in favor of conversion, and there were no special circumstances here to take the case out of the rule. That this was indeed a strong instance of the propriety of the doctrine; for if no conversion took place, there would be but little chance to those in remainder of receiving any benefit from the leasehold property. That the only circumstance apparently in favor of the defendants was the use of the word "*rents*," which seemed to indicate an intention that the residue should be enjoyed *in specie*; but that this word, coupled as it was with other words denoting annual income, could not be much relied on; that the word "*estate*" would have comprised freeholds, if the will had been executed [*514] so as *to pass real estate, and the word "*rents*" might therefore be referred to the testator's idea that he was disposing of real as well as personal property. They distinguished this case from that of *Pickering v. Pickering*,(a) in this, that here the same residue was given to those in re-

(a) 2 Beav. 31, and 4 Myl. & Cr. 289; and see *Howe v. Lord Dartmouth*, 7 Ves. 137, (1802;); *Fearn v. Young*, 9 Ves. 549, (1805;); *Crawley v. Crawley*, 7 Sim. 427, (1835;); *Mills v. Mills*, 7 Sim. 501, (1835;); *Fryer v. Buttar*, 8 Sim. 442, (1837;); *Benn v. Dixon*, V. C., (May 1, 1840;); [Reported 10 Sim. 636;]; and *Lichfield v. Baker*, ante, p. 481, (1840;); [*Cairns v. Chaubert*, 9

1840.—*Robinson v. Addison.*

mainder as to the tenant for life, whereas, in *Pickering v. Pickering*, the Lord Chancellor mainly founded his decision on the fact of a different residue being given to the widow during her life from that which was afterwards bequeathed to the son.

Mr. *Pemberton* and Mr. *Prescott White* appeared for the defendants Tremamondo and Castell and his wife, and Mr. *Loftus Wigram*, for Thomas William Flavell; but

THE MASTER OF THE ROLLS, without calling on them, said, that he could not declare this to be a case of conversion without striking out altogether, the word "rents," which was twice repeated in the will, and it appeared that there was no other property belonging to the testator, except the leaseholds, to which the term rents was applicable.

*ROBINSON v. ADDISON.

[515]

1840: May 9, June 27.

A testator having fifteen and a half Leeds and Liverpool canal shares, which by act of Parliament were to be deemed personal estate, bequeathed five and a half such canal shares to A., five such shares to B., and five such shares to C. There was no description or reference in the will to show that the testator intended to give the particular shares which he held at the date of his will. At his death he possessed no Leeds and Liverpool canal shares: Held, that the legacies were general, and not specific.

A canal was made under the authority of an act of Parliament, the lands for that purpose were purchased and vested in a corporation, but the shares therein were to be deemed to be personal estate, and transmissible as such, and were to be conveyed by bargain and sale: Held that the shares did not bear the character of realty, so as to make a bequest of them specific.

THE only question in this cause was, whether the legacies of certain shares in the Leeds and Liverpool canal bequeathed by the will of John Robinson, were to be considered as general or as specific legacies.

The canal was made under the authority of an act of Parliament passed in the tenth year of King George III. (10 G. 3, c. 114.) (a) The expense of the canal was defrayed by subscription; and by the twenty seventh section, the sum subscribed was divided and distinguished into shares which were vested in the subscribers and their several and respective executors, administrators, and assigns, proportionately to the sums they had respectively sub-

Paige, 160,] all which are in favor of conversion. *Holland v. Hughes*, 16 Ves. 111, and 3 Mer. 685, (1809); *Vincent v. Newcombe*, 1 Younge, 599, (1832); *Collins v. Collins*, 2 Myl. & K. 703, (1833); *Alcock v. Soper*, 2 Myl. & K. 699, (1833); *Bethune v. Kennedy*, 1 Myl. & Cr. 114, (1835); *Pickering v. Pickering*, ante, 31, (1839); affirmed, 4 Myl. & Cr. 289; *D'Aglic v. Fryer*, V. C., Feb. 19, (1841); [*Vaughan v. Buck*, 1 Phillips, 75,] in all which the decision was against conversion. In *Gibson v. Bott*, 7 Ves. 89, (1802); and *Dimes v. Scott*, 4 Russ 195, (1828); there was an *express* direction to convert. [See further ante, 57, n. 2. 10 Sim. 638, n. 1, 2. Ibid 639, n. 2.]

(a) Additional powers were given by the 23 G. 3, c. 47, the 38 G. 3, c. 65, the 54 G. 3, c. 94, and the 59 G. 3, c. 105, but no alteration was made in the tenure of the shares.

1849.—Robinson v. Addison.

scribed; and all and every such shares were to be deemed and taken to be personal estate, and to be transmissible as such. The form of conveyance was by bargain and sale.

The testator at the date of his will, (the 25th of October, 1819,) was entitled to fifteen and a half of those shares, and by his will, after devising his estate at Althorne to Joshua Robinson and James Addison in fee, in [*516] trust for the use of his son John Robinson for life, and *after his decease in trust to settle upon the eldest child of his son, and to divide the produce with various remainders, he expressed himself as follows:—"I also give and bequeath to the said Joshua Robinson and James Addison, their executors, administrators and assigns, *five and a half shares* in the Leeds and Liverpool canal, and all benefit and advantage thereof, upon trust;" and he then declared a trust for the benefit of his son, and other trusts similar to those on which he had given his estate at Althorne; and having given a freehold house in Bond street for the benefit of his daughter, Jane Gibson, and her children; he also gave and bequeathed "*five shares* in the Leeds and Liverpool canal, and all benefit and advantage thereof to Joshua Robinson and James Addison, their executors, administrators and assigns, upon trust for the benefit of his said daughter Jane Gibson, and her children," in the same manner as before expressed respecting the freehold house in Bond street, so far as the nature of the estates and interests therein would apply. He afterwards gave and bequeathed "*five shares* in the Leeds and Liverpool canal, and all benefit and benefits thereof, unto Joshua Robinson and James Addison, their executors, administrators and assigns, upon trust for the benefit of his daughter Dorothy Jemima Robinson, and her children," in the same manner as before expressed concerning certain freehold houses in the Strand, and Dean street, which he had before given to the trustees for the benefit of his daughter Dorothy Jemima Robinson and her children; and he gave the residue in trust for his daughter Dorothy Jemima Robinson for life, with remainder to her children.

The testator died in October, 1824.

At different times between the date of his will, and the beginning [*517] of the month of June, 1820, the testator *sold all the fifteen and a half shares which he possessed at the date of his will, and at his death in the month of October, 1824, he was not possessed of any share in the canal.

The plaintiffs by this bill insisted, that the bequests of the canal shares were general and not specific legacies; the bill prayed a declaration to that effect, and that they were entitled to have so much money as at the end of one year from the testator's decease would have been sufficient for the purchase of fifteen and a half shares, according to the current market price, with interest thereon.

The defendants entered into evidence, the object of which was to show that there was no current market price of these shares; that they were usually held as permanent investments, and that the sale of them was rare.

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That they were not commonly brought into the market, and could not therefore be purchased through brokers, like stock and other shares in public companies, but were generally disposed of by private arrangement between the parties.

Mr. *Kindersley* and Mr. *Younge*, for the plaintiffs, contended that these were general legacies, and that their value ought to be raised out of the general personal estate. They urged that the court at all times inclined towards the construction that legacies were general and not specific. That legacies of public funds, Bank or South Sea stock, or South Sea annuities were never held specific, although the testator happened to possess such funds, stock, or annuities at the time of making his will. That it required something to identify the particular stock held by the testator at the time to make it specific, as the words, "my stock," or "the stock I now possess," [*518] and this was wholly wanting in the present case; they cited *Simmons v. Vallance*,^(a) *Bronsdon v. Winter*,^(b) *Innes v. Johnson*,^(c) note to *Hinton v. Pinke*,^(d) and *Bligh v. Brent*.^(e)

Mr. *Pemberton*, Mr. Sergeant *Talfourd*, and Mr. *Bacon* for the principal defendants, contended that the legacies were specific and had been adeemed by the sale.[1] That there was no general rule which made all bequests of stock general legacies, but that all such cases depended on the intention of the testator to be collected from the will. That here beyond doubt the testator contemplated leaving the particular shares he possessed at the time, or why dispose of fifteen and a half, the exact number which he was then entitled to?

Again, the shares savored of the realty and were personal estate no farther than the statute made them so; they passed by bargain and sale, and differed from the public stocks, which could be left to a charity, while these shares could not; that they were in the nature of chattels real, and the bequest of them had been adeemed by their sale by the testator in the same way as a bequest of a leasehold or of a particular mortgage or of turnpike tolls would be adeemed.

They cited *Avelyn v. Ward*,^(g) *Parrott v. Worsfold*,^(h) *Ashton v. Ashton*,⁽ⁱ⁾ *Pattison v. Pattison*,^(k) and *Hayes v. Hayes*.^(l)

*Mr. *C. P. Cooper* and Mr. *W. H. Clarke* for other defendants. [*519]

THE MASTER OF THE ROLLS:—My present impression is, that these are general legacies, and that neither the expressions in the will nor the difficulty in purchasing and selling the shares prevent that construction.

The principal question, however, is whether the connection of the subject

(a) 4 B. C. C. 245.

(d) 1 P. Wms. 539, 6th ed.

(k) 1 Jac. & W. 594.

(l) 1 Myl. & K. 12.

(b) 1 Ambler, 57.

(e) 2 Y. & Col. 268.

(i) 3 P. Williams, 384, and Forrester, 152.

(j) 1 Keen, 97.

(c) 4 Ves. 568.

(g) 1 Ves. sen. 430.

[1] Vide *Newbold v. Roadknight*, 1 Russ. & M. 677.

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of the gift with real estate is such as to make the legacies specific.[1] I will examine the act of Parliament, and consider the point.

June 27.—THE MASTER OF THE ROLLS:—In the gift the testator has used no words of description or reference, by which it appears that he meant to give the specific and particular shares which he then had.

Various arguments depending on the general scope and effect of the will, were used for the purpose of showing that the testator, in giving the precise number of shares which he possessed, must have had those shares in his contemplation and none other, and consequently must have meant specific gifts of them; and it was insisted upon that these shares were an interest in the land, and that although the act declares them to be personal estate, and transmissible as such, yet still they must be considered as chattels real, and that a legacy of an interest in them must be a specific legacy.

[*520] "It was further agued that the shares of this canal were so rarely brought to market, that they could not be considered as transferable or purchasable for money, and could not be considered as gifts of particular things which the executors could purchase out of the assets.

It is, however, clear that the testator, if he had meant to give only the shares which he had, might have designated them as "*his*,"[2]—that the mere circumstance of the testator having, at the date of his will, a particular property, of equal amount to the bequests of the like property which he has given without designating it as the same, is not a ground upon which the court can conclude that the legacies are specific; and upon the whole context of the will, it does not appear to me, that the trusts on which the legacies are given, afford sufficient evidence that the testator meant those legacies to be specific.

There is no description or reference to show that he meant to give the particular shares which he had at the date of his will, nor any trust from which it can, as it appears to me, be concluded, that he must have meant only such shares as he had at the respective times of making his will and of his death.

As to the nature of the property, the canal and lands are vested in a corporation. The lands were purchased, and the canal constructed by means of money raised by subscriptions. The capital so raised is divided into 2600 shares, which are to be deemed personal estate, and to be transmissible as such; and the shares, though not frequently sold, are nevertheless occasionally bought and sold, and may be had for money, and the question is,

[1] A bequest of personal estate is not specific, merely because it is coupled with a devise of real estate, which is necessarily specific. *Howe v. The Earl of Dartmouth*, 7 Ves. 137.

[2] So, in *Shuttleworth v. Greaves*, 4 Myl. & Cr. 35. Stated, *ante*, 260, n. 1. The employment of the word "*my*," had a material bearing upon the construction of a bequest of what the testator called "all my shares, &c." See further as to the word "*my*," *Morrice v. Leugham*, 11 Sim. 274, 275. It is obvious that "*his*," as used in the text, is merely a substitute for "*my*." A testator always expressed himself in the first person singular.

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whether the legacy, if it be not otherwise specific, is made so by reason of the nature of this *property. This, however, is not the [*521] gift of freehold or leasehold estates, or of a sum to be paid out of lands, or out of the produce of lands, in such a form as to make it specific. The testator had no share in the canal at the time of his death, though he had the means by which the shares might have been obtained; and conceiving that the words of his will are not such as to indicate that he meant to give the particular shares at the date of his will, it is to be considered what he did give. He intended his legatees to have so many canal shares, but not giving the specific shares that he had, he gave nothing which was distinguished or severed from the rest of the testator's estate, but in effect gave such an indefinite sum of money as would suffice to purchase so many shares as he had given, those shares being any such shares as could be purchased, and not certain particular and defined shares.

This bequest does not appear to me to have any of the qualities of a specific legacy, and I am therefore of opinion, that the three bequests of canal shares which are given by this will, are to be considered as general legacies.[1]

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[*522]

1840: June 4, 5, 8.

If a woman entitled to property, during the treaty for marriage, represents to her intended husband that she is so entitled, that upon the marriage he will become entitled *jure mariti*, and if during the same treaty she clandestinely conveys away the property in such manner as to defeat his marital right, and secure to herself the separate use of it, and the concealment continues until the marriage, a fraud is thus practised on the husband, and he is entitled to relief.

Direct misrepresentations, or wilful concealment with intent to deceive the husband, would entitle him to such relief; and if both the property and the mode of its conveyance pending the marriage treaty, be concealed from the intended husband, there is still a fraud practised on him; cases have however occurred in which concealment, or rather the non-existence of communication to the husband, has not been held fraudulent; and whether fraud is made out must depend on the circumstances of each case.

As a conveyance made immediately before her marriage is *prima facie* good, it is to be impeached only by the proof of fraud.

In August a widow, having a second marriage in contemplation, settled her property on herself for life, for her separate use, with remainder to the children of her first marriage, and in October following she married. The settlement was prepared by her direction, without the privity or assent "of her then intended husband." In a suit to carry the settlement into execution, the second husband insisted on the settlement being a fraud on his marital rights, but it was not

[1] Vide 1 Beav. 410, n. 1. Ante, 260, n. 1. *Sheffield v. The Earl of Coventry*, 2 Russ. & M. 317. *Banks v. Sladen*, Taml. 407. *Douglas v. Congreve*, 1 Keen, 410. *Kemp v. Jones*, 2 Keen, 756. A testator bequeathed the sum of 4000*l.* capital stock in the 3*l.* per cent. consols, or in whatever of the government funds the same should be found invested: this was held to be a specific legacy. *Hesking v. Nichols*, 1 Yo. & Coll. C. C. 478.

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proved that in August he was "the intended husband:" Held, that the evidence was insufficient to impeach the deed.

Assignment of all and every the household goods, &c., the particulars whereof were stated to be more fully set forth in an inventory signed by the grantor, and annexed thereto. There was no such inventory: Held, nevertheless, that the assignment was effectual, it appearing from the answer of the party resisting its validity, that the particulars could be ascertained.

THE question in this cause was, whether a settlement made by Mrs. Joan Mason, since deceased, shortly before her marriage with the defendant Mr. Broad, without his concurrence, was or not a fraud on his marital rights.

William Mason, by his will, gave all his real and personal estate to his widow Joan Mason. The testator died in 1816, leaving his widow and three daughters, one of whom was plaintiff in this suit, surviving him. The widow proved the will, entered into possession, and continued to carry on the testator's business of victualler.

By indentures of the 5th of August, 1818, in consideration of natural love and affection, Mrs. Joan *Mason conveyed her freehold and leasehold property to trustees, upon trust as to part near the Magdalen Chapel, Bristol, for such uses as she, whether covert or sole should appoint; and in default for her separate use for life, with remainder to her heirs; and as to the other part of the property for her separate use for life, with remainder to her three daughters and their children. She also assigned to trustees, "all and every the household goods, furniture, plate, linen, china, books, stock in trade, brewing utensils, and all other the effects of her Joan Mason," the particulars whereof were stated "to be more fully set forth and expressed in an inventory thereof signed by the said Joan Mason, and thereunto annexed," upon trust for herself for her separate use for life, and after her death, to sell the household goods, &c., and thereout to pay off a mortgage on part of the freehold property situate in Bath Street, and to divide the surplus between her three daughters.

There was in fact no inventory of the household goods, &c., signed by Mrs. Joan Mason, or annexed to the deed. The execution of the deed was not accompanied or followed by any change or alteration in the apparent ownership or possession of the property comprised in it; and until her second marriage, which afterwards took place, Mrs. Mason acted as owner of the property in the same manner as she had previously done.

On the 26th of October, 1818, Mrs. Joan Mason married the defendant Mr. Broad, who entered into the receipt of the rents of the freehold and leasehold property comprised in the settlement, and took possession of, and apparently dealt with the personal chattels as his own; he thenceforward carried on the business in his own name until August, 1832, when he sold the business, stock, and effects for 871*l.*, and applied 150*l.* part thereof in satisfaction of trade debts, and paid 200*l.* in discharge of the mortgage of the Bath street property, upon which the title deeds of that property were delivered over to Mr. Broad.

Mrs. Joan Broad died in 1833, and this bill was filed in 1836, by one of

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the three daughters by her former marriage, against Mr. Broad and the trustees, for the purpose of having the trusts of the deed of the 5th of August, 1818, carried into execution for their benefit.

It appeared from the statements in the answer, that in 1829, Mrs. Broad, without her husband's consent, mortgaged, a part of the freehold property, over which under the settlement she had a power of appointment, for 160*l.*, of which 150*l.* being the balance after payment of costs, was given to the plaintiff by Mrs. Broad, her mother; it also appeared that in the year 1831, Mrs. Broad sold the same piece of land for 364*l.*, or thereabouts, and thereout paid the mortgage for 160*l.* and interest, and applied the remainder to her own private purposes, and principally in making presents to the plaintiff and her children. The defendant Mr. Broad, however, said that he had been made a party to the conveyance, but that he had never executed it, and that it had not been tendered to him.

Mr. Broad, by his answer, insisted that the settlement had been made pending the time he was paying his addresses to Mrs. Mason, and wholly without his concurrence or knowledge; that Mrs. Mason was the ostensible owner of the property on her marriage, and that the settlement was a fraud on his marital rights.

*The execution of the settlement was proved by Mr. Davies, a so- [*525] licitor, who, in cross-examination, amongst other things stated, that Mrs. Joan Mason having about the middle of 1818, stated that she was about to be married, he had advised a settlement to be made, and that it was his strong belief that in the course of the preparation of the settlement, he advised the joining therein of her intended husband, for the purpose of barring him; that "he did not think the settlement had been prepared or executed with the privity or assent of *her then intended husband*, and that its existence was not, to his knowledge, communicated to him before the marriage. That in his communications with John Broad, she desired that the said deed should be prepared and executed without the privity of *her then intended husband*."

No evidence was read by the defendants at the hearing, to show who was the person described by this witness as "*her then intended husband*."

Mr. C. P. Cooper and Mr. Dixon (in the absence of Mr. Pemberton) for the plaintiff, assumed that at the time of the execution of the settlement, Mr. Broad was paying his addresses to the settlor, but they argued that there was no proof of misrepresentation or concealment up to the time of the marriage, and that concealment alone was not sufficient to invalidate the deed. That it did not appear that the marriage took place on the faith of Mrs. Joan Mason being the absolute owner of this property; nor did it appear that the husband had made any inquiries respecting it, and that therefore, there could be no disappointment on his part. That the husband must have had notice of the settlement before or soon after the marriage, and had *ac- [*526] quiesced in it by paying off the mortgage, and permitting his wife to sell a portion of the property. That the *onus* of proof lies on the defendant,

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who had failed in making out any case, and had himself taken no proceedings to set aside the settlement. They cited *St. George v. Wake*,^(a) and the cases there referred to.

Mr. *Kindersley* and Mr. *James Russell*, for Mr. Broad, read no part of their evidence showing that Mr. Broad was the person with whom Mrs. Joan Mason contemplated marriage at the date of the settlement; but they argued, that the circumstances of the case showed clearly that a fraud was intended: that the deed was voluntary, and, by her express desire, had been prepared without the privity of her intended husband, while she remained the ostensible owner to the day of her marriage. They also argued that Broad, after the marriage, had dealt with the property as his own; and that, as to the leasehold furniture, &c., the deed was void for want of a schedule or inventory defining what was intended to pass; *Weeks v. Maillardet*.^(b)

Mr. *Tinney* and Mr. *Simons* for trustees; Mr. *Spurrier* and Mr. *Elderton* for the other claimants; and Mr. *J. Taylor* for the plaintiff's husband.

Mr. *Pemberton*, in reply, insisted that there was no evidence of any marriage being in contemplation between Mrs. Mason and Mr. Broad at the time of the settlement, or even that they were acquainted; that it must be assumed, that marriage in general, was in her contemplation, and not a marriage with this particular person; and that the case was like that of *Lady* [*527] *Strathmore v. Bowes*,^(c) where a settlement was made by 'Lady Strathmore with the concurrence of Mr. Grey, the then intended husband, and a few days after the execution she determined to marry Mr. Bowes; the marriage took place the following day, and the settlement was held valid against Mr. Bowes, for a marriage with him was not then in contemplation. That the rule could not apply to real estate, the inheritance of which a husband would not take by marriage, and as to which he would only become tenant by the courtesy; he drew a distinction between courtship and engagement in cases of this description, contending that though a concealed settlement might be invalid pending an engagement, yet the same result did not follow if made pending courtship.

June 8.—THE MASTER OF THE ROLLS:—The bill in this cause prays that a settlement, which was made for the benefit of the plaintiff and her two sisters, the defendants Jane Barton and Eliza Davis, by their late mother, Joan Mason, who became the wife of John Thiery Broad, may be carried into execution.

Joan Mason was a widow with three children, and, under the will of her first husband, she was entitled to some freehold and leasehold property, to some furniture, and to the stock in trade, with which she carried on business as a victualler.

(a) 1 Myl. & K. 610.

(b) 14 East, 568.

(c) 1 Ves. jun. 22, and 6 B. P. C. 427.

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Contemplating a second marriage, she considered that she ought to make a provision for her children by the first, and being informed that a will which she had made, would upon her marriage become ineffectual, she made a settlement and thereby provided that a portion of her freehold property should be subjected to *her own power of appointment, but that sub- [*528] ject to such power of appointment, that part of her estate over which the power extended, together with all the rest of her property, should be limited to her own separate use for her life, with remainder for her three daughters in the manner therein mentioned.

In the execution of this settlement, so far as it made provision for her children, she was performing a moral duty: in the circumstances in which she was placed it was clearly her duty, before she placed herself and her property in the power of her second husband, to secure a provision for her children by her first husband, from whom her property was derived; but in performing a duty towards her children, she had no right to act fraudulently towards her second husband.

If a woman, entitled to property, enters into a treaty for marriage, and during the treaty represents to her intended husband that she is so entitled, that upon the marriage, he will become entitled *jure mariti*, and if, during the same treaty she clandestinely conveys away the property, in such manner as to defeat his marital right, and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband, and he is entitled to relief.

The equity which arises in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question, whether the facts proved do or do not amount to sufficient evidence of fraud practised on the husband. It is not doubted that proof of direct misrepresentations, or of wilful concealment with intent to deceive the husband, would entitle him to relief; but it is said that mere concealment is not, in *such a case, any evi- [*529] dence of fraud, and that if a man without making any inquiry as to a woman's affairs and property, thinks fit to marry her, he must take her and her property as he finds them, and has no right to complain, if, in the absence of any care on his part, she has taken care of herself and her children without his knowledge.

This proposition, however, cannot be admitted as stated; and clearly a woman, in such circumstances, can only reconcile all her moral duties by making a proper settlement on herself and her children, with the knowledge of her intended husband.

If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, as was the case in *Godard v. Snow*, there is still a fraud practised on the husband. The non-acquisition of property, of which he had no notice, is no disappointment, but still his legal right to property actually existing is defeated, and the vesting and continuance of a separate power in his wife over property which ought

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to have been his, and which is, without his consent, made independent of his control, is a surprise upon him, and might, if previously known, have induced him to abstain from the marriage.

Nevertheless, cases have occurred in which concealment, or rather the non-existence of communication to the husband, has not been held fraudulent, and whether fraud is made out must depend on the circumstances of each case,—as an unmarried woman has a right to dispose of her property as she pleases, and as a conveyance made immediately before her marriage is *prima facie* good, it is to be impeached only by the proof of fraud.

[*530] *In the present case the plaintiff alleges that no fraud is proved, and that any circumstances which tend to create doubt, ought to have no weight, in a case where no regular proceeding has been adopted to set aside the settlement.

The defendant Broad insists that fraud is proved ; that during the treaty, and at the time of the marriage, Mrs. Mason was in the receipt of the rents of the freehold and leasehold property, and in the possession as apparent owner of the personal chattels ; that the settlement was entirely concealed from him till after the marriage, and that he never acquiesced in it.

The settlement was executed on the 5th of August, 1818 : the marriage did not take place till the 14th of October, 1818, being more than two months afterwards.

The settlement being proved by William Davies, the defendant Broad has cross-examined that witness, to prove that when it was prepared, a fraud upon him was intended ; and Davies says that Mrs. Mason told him she was about to be married, and instructed him to prepare the settlement ; he does not think it was prepared or executed with the privity or assent of *her then intended husband* ; its existence was not, to the witness' knowledge, communicated to him (the then intended husband) before the marriage ; and that in his communications with Mrs. Broad, she desired that the deed should be prepared and executed without the privity of her then intended husband. It was observed upon this evidence, that the defendant, John Thiery Broad, is not stated by the witness to have been the then intended husband. The observation is true, and is the more remarkable, upon its appearing that in one of the interrogatories upon which this evidence is given, the

[*531] *witness was distinctly asked, " Whether the settlement was prepared or executed with the knowledge, privity, or assent of the defendant John Thiery Broad ; was its existence communicated to him before the marriage ?" The answer, without naming Broad, or speaking of the knowledge which the intended husband might have, is, that the witness " did not think the deed was prepared with the privity or assent of her then intended husband."

However probable it may be that John Thiery Broad was then the intended husband of Mrs. Mason—and in the opening of this case the fact was assumed to be so—the observation cannot be otherwise than material. In *Lady*

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Strathmore's Case, on the 10th of January, when the settlement was made, Mr. Grey was her intended husband, and the settlement was made in contemplation of a marriage with him; on the 17th of the same month, and only a week after the execution of the settlement, she married Mr. Bowes, who complained of the settlement. In that case Lord Thurlow thought, that marriage in general was the object of Lady Strathmore; and for any thing to the contrary which appears in the evidence of Davies, such may have been the object of Mrs. Mason when this settlement was prepared and executed—the treaty with Broad may have commenced subsequently.

Even if Broad was the then intended husband, more than two months elapsed between the execution of the settlement and the time when the marriage took place, and proof of a desire to conceal at the time when the settlement was executed, is not, of itself, proof that the same desire was continued and acted upon up to the time of the marriage. The desire to conceal the settlement, up to the time when it was completed, might *have [*532] arisen from a desire to have the business completed before the communication was made, from a wish to protect herself from importunity and against any yielding on her own part. Before the execution of the settlement, she might fear her power to resist persuasion; afterwards she might say it is done, and if at all, you must take me with the settlement. This is mere hypothesis, not warranted by any facts proved in this case; but the probability of such a case shows that proof of concealment till the settlement was executed is not necessarily proof of concealment up to the time of the marriage; it is evident that there might have been a full communication without the knowledge of Davies.

In another part of his evidence, Davies proves that upon the execution of the settlement there was no change or alteration in the possession of the property comprised therein, that Joan Mason acted as the owner up to the time of the marriage, and that upon the marriage Broad took possession, and appeared to deal with the personal chattels as his own, and he carried on the business, which had previously been conducted by his wife, in his own name, and was from the time of the marriage in the apparent absolute ownership of all the goods and effects of the premises.

This is all the evidence adduced as to any thing which took place before and up to the time of the marriage; and I do not think that it amounts to distinct proof, that the settlement was executed during a treaty for marriage between the defendant Broad and Joan Mason, the mother of the plaintiff: or that Joan Mason desired the preparation and execution of the settlement to be concealed from the defendant Broad: or that Broad was ignorant of the settlement at the time of the marriage; all these allegations are, I think, consistent with the *evidence of Davies, but do not appear to [*533] me to be proved by it.

The only other evidence is that which is read by the plaintiff from the answer of Broad, and thereby it appears that from the time of the marriage up

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to August, 1832, Broad carried on the business of a victualler; that he then sold the business together with the stock in trade and effects, to a Mr. Davies at a valuation, and the amount of the valuation, after deducting excise duty, was 87*l.* 18*s.* 11*d.*: that the sum of 107*l.* 7*s.* 8*d.* was the value of household goods and utensils purchased by himself with his own money after his marriage: that 152*l.* 11*s.* 1*d.* was applied in satisfaction of trade debts due when the business was disposed of: that 200*l.* was paid for principal money, and 2*l.* 5*s.* 5*d.* for interest due on a mortgage charged on a part of the freehold estate comprised in the settlement. He further says that the valuation comprised the good will of the business, the stock of spirits, and some other things not comprised in the settlement: and that he always treated the effects as his own absolute property, and disposed of them accordingly.

Upon this part of the evidence, it is proper to observe, that at the date of the settlement the freehold estate in Bath street, being part of the freeholds comprised in the settlement, was subject to a mortgage of 250*l.*, and that one of the provisions of the settlement was, that on the sale of the household goods, stock in trade, and effects, which was intended to be made on the death of Mrs. Broad, the mortgage on the Bath street estate was to be paid out of the proceeds of the sale. Mr. Broad says that 50*l.* part of the mortgage money, was paid by Mrs. Mason about a month before her marriage; 200*l.* [*534] remained due, and by the settlement "was charged on the proceeds of the sale of the household goods and effects. The sale was made in the lifetime of Mrs. Broad, before the time mentioned in the deed: but the payment of the mortgage out of the proceeds appears to me to show, that Mr. Broad at that time knew of the deed, and of that provision contained in it, and so far at least acquiesced in it. If there had been no such deeds, he would have been seised of the freehold in right of his wife, and the proceeds of the sale of the goods and effects would have been absolutely his; and if he had thought fit to pay of the mortgage, he might have continued the charge on the land for his own benefit. All that he says is, that when the mortgage was paid off, the title deeds of the estate were given up to him.

He further says, that upon his marriage he entered into the receipt of the rents and profits of the freehold and leasehold estates comprised in the settlement, and that he paid the rents reserved on the leaseholds, and also paid insurances.

He further states his belief, that in the year 1829, his wife, Joan Broad, without his consent, mortgaged a part of the freehold, namely, that part over which the settlement gave her a power of appointment, to Mr. Strickland for 160*l.*, of which 150*l.*, being the balance after payment of costs, was given to the plaintiff by Mrs. Broad, her mother, and that in the year 1831, Mrs. Broad sold the same piece of land to Mr. Boley for 364*l.* or thereabouts, and thereout paid Strickland's mortgage and the interest thereon, and applied the remainder, after paying costs, to her own private purposes, and principally in making presents to the plaintiff and her other children. He says that he was made

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a party to *the conveyance to Boley, but that he never executed it, [*535] and it was not tendered to him.

As Mr. Broad was in possession of the property, it could not be sold, and possession be delivered to a purchaser without his knowledge. If there had been no settlement, or if the settlement had been fraudulent and void, Mr. Broad, in right of his wife, would have been entitled to receive the rents, and the estate could only be sold by means of the power conferred by the settlement. He now says, that the settlement was fraudulent and void, and yet in 1831 we see him acquiescing in this sale.

Mrs. Broad died on the 14th of March, 1833, and this bill was filed on the 26th of January, 1836. The defendant, Mr. Broad, notwithstanding his present allegation of fraud, has never filed any bill to be relieved from the settlement as fraudulent, and on the whole case, considering that there is no sufficient proof that a treaty of marriage was subsisting between the defendant Mr. Broad, and Mrs. Mason at the time when the settlement was executed:—that there is no sufficient proof of concealment up to the time of the marriage:—that if Mr. Broad did not know of the settlement before or at the time of the marriage, he certainly did know of it not long afterwards, and permitted his wife to act against his interest in execution of the power given to her by the settlement; and never has attempted, and does not now attempt, to set it aside. I think that upon this bill, and upon the evidence before me, I am bound to give the plaintiff the relief which she seeks.[1]

[1] In a later case in which a husband sought to set aside a settlement made by the wife, before marriage, Wigram, V. C., made some important observations, which, notwithstanding their length, it is deemed highly proper to transcribe. The Vice Chancellor says:—"The bill seeks to set aside a deed executed by the defendant, E. T., before her marriage, as a fraud on the marital right of the plaintiff." There was another ground taken as to the validity of the settlement, which was readily disposed of, by the Vice-Chancellor, who continues:—"I proceed, therefore, to consider the case, as it depends upon the equity to which the husband has, in some cases, been held entitled, where a settlement has been secretly made by the wife, of her own fortune, during the treaty of marriage, such treaty having terminated in marriage; and in doing this, I think it necessary to explain the ground on which I proceed.—It was argued by the defendants, who resist this claim, that the plaintiff was ignorant, until after the marriage, that the wife was possessed of the property in question.—In *De Manneville v. Crompton*, (1 Ves. & B. 354,) Lord Eldon made the important observation, that, in the absence of any representation having been made as to specific property, no implied contract is raised on the part of the lady, during the treaty of marriage, that her property, as it existed at the time of the commencement of the treaty, shall be in no way diminished. This undoubtedly shows Lord Eldon's opinion to be, that it is not every alienation of the wife's property, during the treaty, which can be regarded as fraudulent, only because the husband was not a party to it. But I should certainly have great difficulty in applying the proposition so laid down by Lord Eldon, to a case in which every farthing of the wife's property was, without the knowledge of the husband, wholly withdrawn from his control, and settled on herself, her children, or her appointees, to the total exclusion of the husband. A very special case must be made out, before the court would carry the proposition so far.—I think another argument on behalf of the defendants was also carried beyond its just limits, in contending that actual fraud or deception on the husband must be proved. Notwithstanding there are some *dicta*, which may at first be considered as implying the contrary, (but which may, I think, be explained,) I take the rule of the court to be correctly stated in Mr. Reper's Treatise, (*Law of Husband and Wife*, vol. 2, p. 162:) 'Deception will be inferred if, after the commencement of the treaty for marriage, the wife should attempt to make any

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I have understood, from the statement made during the hearing, that the evidence which has been stated to me is not the whole evidence which [536] has been taken in the case; my opinion is formed only on the evidence which has been produced.

disposition of her property without her intended husband's knowledge or concurrence.' This way of stating the law does not exclude inquiry into the circumstances by which the apparent deception may be explained, nor does it conflict with the modern cases to which I was referred.—Several circumstances would certainly appear to have been sometimes thought material as negating the imputed fraud; such as the poverty of the husband—the fact that he has made no settlement upon the wife—the reasonable character of the settlement, as in the case of a settlement upon the children of a former marriage,—and the ignorance of the husband that the wife possessed the property. Upon these I am not called upon to say more, than that I am glad to find other grounds upon which to decide the present case. I could not give my individual assent to the sufficiency of any of the reasons I have mentioned. The poverty of the husband—the absence of any settlement upon the wife—the reasonable manner in which she desires to deal with her property, may be very material considerations for the guidance of the parties in determining in what manner the wife's fortune should be settled; but why they should constitute a reason for concealing the arrangement from the husband, I cannot comprehend. It might be very proper to bring these considerations to the attention of the intended husband. He might be told that the lady has a certain fortune, but regard being had to the claims upon her, and to his circumstances, the settlement ought to be made in a particular way; and upon this statement, if he does not approve of the proposed settlement, the marriage contract may be determined; but I cannot comprehend the reasoning which says, that any one of the reasons suggested is a sufficient ground for practising concealment upon the husband, or treats such concealment as immaterial. So, also, with respect to the ignorance of the husband of the property of the wife—that, no doubt, materially lessens his disappointment at finding the wife's fortune has been withdrawn from his control; but the equity is not founded upon his disappointment; for, if that were so, it would follow that his ignorance of the existence of the property would always be an answer, however that ignorance was produced: the equity would never arise, where the wife had contrived to conceal her property from her husband;—but this is not so, for the cases clearly show, that practised concealment by the wife will be treated as a fraud on the husband. I am bound, however, to say, that the facts to which I have adverted,—having been more or less relied on by the court, in refusing to disturb a secret settlement,—are facts which I ought not to disregard in considering whether this settlement is to be deemed fraudulent or not. And nearly every one of those circumstances enters into the present case. But without calling any one of those reasons to the aid of my judgment, there is one fact which determines me in refusing the relief which the husband asks in this suit; and it is, that the husband before the marriage, put it out of the power of the wife effectually to make any stipulation for the settlement of her property. By his conduct towards her, retirement from the marriage was, on her part, impossible. She must have submitted to a marriage with her seducer, even although he should have insisted on receiving and spending the whole of her fortune. The only way in which a woman can insist upon a settlement is, by making it a part of the marriage treaty that her property shall be settled. The husband, by bringing the intended wife to his house, and inducing her to cohabit with him before the marriage, deprived her of the power to protect herself, and thereby precluded himself from telling this court, with any effect, that his wife has committed a fraud upon him, because she has taken the precaution to have her property secured for herself and her children. Adverting to the comparatively slight grounds on which the court has, in some cases, rested its denial of the equity of the husband in such cases, I am very far within the limits of authority in saying, that a woman, in the view of this court, commits no fraud on her husband, if, in circumstances like the present, she takes the only means he has left her of protecting herself,—that of making a settlement without his knowledge." *Taylor v. Pugh*, 1 Haro, 608. On the other hand, a deed given by a husband, just previous to his marriage, to his daughter, which was without consideration, and was kept concealed until after the marriage, was adjudged fraudulent as against the wife's claim of dower. *Swains v. Perins*, 5 Johns. Ch. Rep. 489. See further, 1 Story's Equity, § 268, 273.

 1840.—*Busk v. Beetham*.

The case of *Weeks v. Maillardet*(a) was cited for the purpose of showing, that as to the personal chattels, the deed was void for want of a schedule; but the deed in this case is not expressed in the same manner as was the deed in the case cited, and from the particulars which are stated by the defendant Broad, in his answer, I apprehend that there will be no difficulty in ascertaining what were the personal chattels, comprised in the deed, which were sold by the defendant Broad in August, 1822.[2]

Declare that the trusts of the settlement, so far as the same remain to be performed, ought to be carried into execution.

Let an account be taken of the household goods, stock in trade, and effects comprised in the settlement, which were sold by the defendant Broad in the month of August, 1832, and of the value thereof, and of the application of the money arising from the sale thereof.

Let the Master inquire, who have or has been in possession or receipt of the rents and profits of the freeholds not sold and of the leaseholds comprised in the settlement, since the death of Mrs. Broad.

And if it shall appear that the defendants, or any or either of them, have or hath been in such possession, let the Master take an account of such rents received by such defendants or defendant.

*The defendant Broad is to pay to the plaintiff her costs of this [*537] suit up to the hearing, deducting from the amount thereof such costs as have been occasioned to the same defendant by the misjoinder of the plaintiff's husband as party plaintiff, and by the amendment of the plaintiff's bill, for the purpose of making her said husband a defendant.(b)

Reserve all other costs and further directions till after the report.

BUSK v. BEETHAM.

1840: February 8.

A plaintiff being ordered to pay costs went abroad, (as was sworn, upon belief and not denied,) permanently and to avoid payment: he was ordered to give security for costs, and the proceedings in the suit were in the mean time stayed.

Effect of affidavits as to facts on belief only, is to put the opposite party to answer them.

ON the 9th of November an order was made for dissolving an injunction in this cause with costs to be paid by the plaintiff; the plaintiff was present when the order was made, but he afterwards left England for France.

(a) 14 East, 568.

(b) See [*England v. Downs*,] 1 Beavan, 96.

[2] Where an absolute assignment of all the assignor's property and choses in action contained a proviso, that the assignor would, with all convenient speed, make out an inventory of such property and choses in action, and which inventory, when made out, was to be considered a part of the assignment; it was held, that the assignment conveyed a present interest to the assignee, and that its taking effect did not depend upon the making of the inventory. *Keyes v. Brush*, 2 Paige, 311.

1840.—Brainbridge v. Burton.

The costs being taxed at 37*l.*, a *subpœna* for payment issued, but the attempts to serve it proved ineffectual ; a *feri facias* afterwards issued, under which the sheriff seized the goods in the plaintiff's house ; but the execution was defeated by a previous assignment which had been made by the plaintiff.

It was now moved, on the part of the defendants, that the plaintiff should give security for costs, and that in the mean time all further proceedings might be stayed. The application was supported by affidavits, stating the above circumstances and that the deponent *"believed* the plaintiff had left this country and gone to reside in France permanently, "with the intention of depriving the defendant of his legal remedy, and of avoiding the service of the *subpœna* and the process of this court."

There was no affidavit filed in opposition.

Mr. Pemberton and Mr. Keene, for the motion.

Mr. Addis, contra :—The witnesses speak only as to their belief of matters not within their knowledge, without stating the facts on what their belief is founded ; this is insufficient evidence. There remains the simple fact of the plaintiff having gone abroad, which is not a sufficient ground to compel him to give security for costs ; *Hoby v. Hitchcock*, (a) *White v. Greathead*. (b)

THE MASTER OF THE ROLLS :—The affidavits are certainly on the belief of the parties ; but this is quite sufficient to call upon the plaintiff to answer them. No affidavits have, however, been produced on his behalf, and under such circumstances the order must be made.[1]

[*539]

*BAINBRIDGE and Others v. BURTON.

1840: February 15.

One of thirty-eight proprietors of a newspaper was appointed book-keeper, and received the moneys of the concern ; a bill being filed against him for an account, &c. by twelve of the proprietors on behalf, &c. : Held, that the remaining twenty-five were necessary parties.

THIS bill was filed by twelve persons, on behalf themselves and all other the proprietors of a newspaper called the Kendal Mercury, except the sole defendant Burton ; and it prayed that the defendant, one of the proprietors, who had been appointed the book-keeper of the concern at a salary, and kept the accounts and received the moneys from 1834, when the paper was established, until 1837, when he was displaced, might account for his receipts and payments, and might pay over the balance and deliver up the books and papers.

The bill alleged "that the proprietors of the newspaper were so numerous,

(a) 5 Ves. 698.

(b) 15 Ves. 2.

[1] The rule of evidence which precludes a party from using the copy of a deed, or other written instrument, without first accounting for the absence of the original, is not applied on motions in the course of practice, at law. *Thompson v. Hewett*, 6 Hill, 254.

1840.—*Bainbridge v. Burton.*

and their respective shares in the said newspaper so fluctuating, and liable to so many trusts, that it was impossible to make them all parties to the suit."

The answer set out the names of twenty-five persons, proprietors in the paper, who had not been made parties, and it denied the allegations above stated; it also alleged that the suit had been commenced without the sanction of all the proprietors, and contrary to the wishes of several of them, and submitted "that the said suit ought not to be permitted to go on, unless all the proprietors in the said newspaper were made parties thereto."

A replication had been filed, but no evidence had been entered into by either party, the cause now came on for hearing.

**Mr. Pemberton* and *Mr. James Russell*, for the defendant, objected, that the suit could not proceed for want of proper parties. [*540]

That this was not one of those cases where the parties were so numerous that they could not be brought before the court. Here there were thirty-eight partners, of whom thirteen were already before the court, and the other twenty-five were not parties. That the defendant, being himself a partner, there were equities to settle between him and his co-partners, which could not be effected in their absence: they cited *Evans v. Stokes*.(a)

Mr. Kindersley, for the plaintiffs, contra:—Where the persons interested are so numerous as to render it impracticable or very inconvenient to make them all parties, the court allows some few to sue on behalf of the rest; *Cockburn v. Thompson*,(b) *Gray v. Chaplin*,(c) *Mitford's Tr.* 170. This is the case here, for by deaths and abatements the plaintiffs may for ever be prevented bringing the cause to a hearing. The object of this bill is to make a party account for his receipts, which is manifestly beneficial to all interested; *Hichins v. Congreve*;(d) it differs from *Evans v. Stokes*, which was to have the affairs of a company wound up.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS:—There are cases, where it clearly appears that the suit is for the common benefit of all the parties, who are very numerous in which the court permits the suit to be prosecuted by some for the benefit of all; but looking at *the nature of the case and the [*541] questions between the parties, I am by no means satisfied that this suit is for the benefit of all the parties interested.

The cause must therefore stand over, with liberty to amend by adding parties, and the plaintiffs must pay the costs of the day.[1]

NOTE.—In *Walworth v. Holt*, 15th January, 1841, [reported 4 Myl. & Cr. 619,] the Lord Chancellor expressed his determination to relax the rule in cases now requiring all the shareholders in a company to be made parties to a suit. [See 4 Russ. 567, n. 1, where the language of Lord Cotnam, on this occasion, is quoted. Also, a fuller statement of that case, 2 Sim. 387, n. 1.]

(a) 1 Keen, 24.

(b) 16 Ves. 321.

(c) 2 S. & St. 267.

(d) 4 Russ. 562.

[1] When a plaintiff may, or may not sue, on behalf of himself and others, see the following cases, in addition to those cited in the text: *Hickens v. Congreve*, 1 Russ. & M. 562, 577. n. 1. *Baldwin v. Lawrence*, 2 Sim. & Stu. 19. *Walburn v. Ingilby*, 1 Myl. & K. 77. *Mare v. Ma-*

 1840 —Gregory v. West.

GREGORY v. WEST.

1840: June 15.

The Master's report had been confirmed, and neither objection nor exception had been taken thereto. The cause came on for further directions, when the court, from the facts stated in the report, entertaining great doubt as to the correctness of the Master's finding, declined to act upon it, though it refused then to alter it.

THIS case came on upon the report of the Master, to whom it had been referred, to take the accounts of the real and personal estate of the testator, and to ascertain the charges executed by James Fletcher West, on his share, and to state their priorities.

James Fletcher West was entitled to a reversionary interest, in part of the real and personal estate of the testator, vested in trustees under the testator's will. It appeared on the Master's report that, in 1830, J. F. West executed a mortgage thereof to the plaintiff, who gave notice to the trustees of the will. By his marriage settlement, dated in 1831, J. F. West conveyed his share in the real and personal estate to trustees upon certain trusts, as to the real, and a sum of 3000*l.* part of the personal estate; due notice was given of this deed, and it was admitted to be the second incumbrance.

[*542] *On the 4th of March, 1832, J. F. West mortgaged his interests under the will, and his life interest, to which he was entitled under the settlement of 1831, to Mr. Hooper. Notice of this incumbrance was given *to the trustees of the settlement*, but not to the trustees of the will.

On the 14th of July, 1832, J. F. West mortgaged his interests under the will to Mr. Long, and notice of this incumbrance was given *to the trustees of the will*, on the 18th of March, 1834. The Master reported that Long was the third incumbrancer, and that Hooper was the fourth. No objection was carried in, and no exceptions were taken to the report, and the cause now came on for further directions.

Mr. Kindersley and Mr. Parry for the plaintiff.

Mr. Simpkinson and Mr. Paynter for Hooper, argued that from the facts it appeared, that Hooper was the third and not the fourth incumbrancer, and they contended that he ought now to be so declared. [THE MASTER OF THE ROLLS:—I am clear that, on this occasion, I cannot change the priorities of the parties as found by the Master; Long, finding the Master in his favor, and there being no objection raised, might have thought it unnecessary to bring forward other evidence. All that can be done, will be to allow you to

lucky, 1 Myl. & Cr. 559, 579. *Milligan v. Mitchell*, 3 Myl. & Cr. 84. *Taylor v. Salmon*, 4 Myl. & Cr. 134, 141. *Wallworth v. Holt*, id. 619. *Hallett v. Hallett*, 2 Paige, 15. *Robinson v. Smith*, 3 Paige, 233. *Walker v. Devereaux*, 4 Paige, 229. *Dias v. Bouchaud*, 10 Paige, 447. *Harvey v. Harvey*, 4 Beav. 215. *Preston v. Grand Collier Dock Co.*, 11 Sim. 327. *Blain v. Agar*, 1 Sim. 37. *Long v. Yonge*, 2 Sim. 369. *May v. Selby*, 1 Yo. & Coll. C. C. 235. *Benson v. Heathorn*, id. 326. See further 1 Keen, 33, n. 1. 1 Sim. 44, n. 1. As to the general rule requiring all persons interested to be made parties, see 1 Beav. 343, n. 1. 9 Sim. 114, n. 1.

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show, from the facts in the report itself, that the court cannot act upon it, in consequence of the finding being inconsistent with the facts.][1] As to the real estate, notice does not affect the priorities, *Jones v. Jones* ;(a) as to the personalty, it having been assigned to the trustees of the marriage settlement, they became trustees of the whole fund, and notice to them was sufficient, at all events, in respect of *the interest which J. F. West took [*543] under that settlement ; the report of the Master is therefore erroneous, and cannot be acted on.

Mr. *Pemberton* and Mr. *Pitman*, contra, for Long, contended that no objections having been carried in, and no exception taken to the Master's report, it could not now be disturbed, and that the court must adopt the finding. That in *Foster v. Blackstone*,(b) the subject matter was real estate, yet priority was held to be gained by notice. They argued also that the notice given by Hooper to the trustees of the settlement was insufficient.

THE MASTER OF THE ROLLS :—The mortgage to Hooper expressly contains an assignment of the mortgagor's interest under the marriage settlement, and notice was given by Hooper to the trustees of that settlement : this notice would be valid so far as these trustees were capable of giving effect to the mortgage ; though in respect of the surplus it might have no validity whatever. Long having no notice of the settlement, gave no notice to the trustees of it. It does not appear clear, what will be the result on a complete investigation of the matter, but not being at present clearly satisfied of the correctness of the finding of the Master, I shall abstain from making any declaration as to priorities, further than as regards the first and second, which are not disputed. The other parties must get rid of the effect of the Master's finding in such way as they may be advised.[2]

NOTE—See *Adams v. Claxton*, 6 Ves. 225 ; and *Brodie v. Barry*, 1 J. & W. 470.

**GRENFELL v. The DEAN and CANONS of WINDSOR and Others.* [*544]

1840: May 7, June 17.

A canon of Windsor granted the canonry and the profits, &c. to the plaintiffs, to secure a sum of money. So far as it appeared on an interlocutory application, the estates were vested in the corporation, and the canon was entitled to an aliquot share of the profits. There was no cure of souls, and the only duties were residence within the castle, and attendance in the chapel twenty-one days a year : Held, upon this state of circumstances, that the security was valid, and a receiver of the profits was appointed.

Principles of public policy, on which pay, pensions, &c. are held unalienable.

(a) 8 Sim. 633 ; and see *Peacock v. Burt*, Coote on Mortgages, 693.

(b) 1 Myl. & K. 297 ; 3 Cl. & Fin. 456.

[1] Vide 9 Sim. 174, n. 1. *Bailey v. Todd*, 1 Beav. 95.

[2] As to notice by an assignee to the trustee of the fund, see 1 Russ. & M. 605, n. 1. 2 Keen, 49, n. 1. ; 53, n. 2 *Meek v. Kettlewell*, 1 Hare, 464, 473.

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IN April, 1829, the defendant, the Rev. R. A. Musgrave, was appointed by letters patent, one of the prebends or canons of the collegiate church or free chapel of St. George, within his Majesty's castle at Windsor, an appointment which produced an income of about 1200*l.* a year.

Being in want of money, Mr. Musgrave, in October, 1838, granted to the plaintiffs the said prebend or canonry, and all the annual income arising from renewal fines, rents, and other perquisites, emoluments, and advantages to which he was entitled as one of such prebends or canons, and he also assigned to them two several policies of insurance, for securing to the plaintiffs the repayment of the sum of 12,000*l.*

It appeared from the answer of Mr. Musgrave, that the income arose from estates possessed by the corporation, the rents and proceeds of which were usually divided half yearly between the dean and twelve canons; but it did not appear that there was any property vested in the dean and canon independently of the corporation.

There did not appear to be any spiritual duties attached to the office, nor any cure of souls, but the answer represented, that the corporation was governed by certain statutes and ordinances, whereby certain duties were imposed upon the members of the said corporation to be by them performed, each member of the said corporation having the privilege of residing [*545] in a "house within the walls of the said castle of Windsor; and that if any member of the corporation failed to perform his appropriated duties, he, by virtue of the said statutes and ordinances, forfeited his right to share in the division of the surplus income of the said corporation, and in lieu thereof was entitled to receive a small fixed stipend, of the amount, as the defendant believed, of 25*l.* a year only; and that the members of the corporation were in such cases entitled to the residue of his share of the surplus income of the corporation. That one of the duties, by the said statutes and ordinances imposed upon each of the said canons, was to reside in one of the said houses within the walls of the said castle of Windsor, and to attend divine service in the said chapel of St. George, at Windsor, twenty-one days in each year.

The defendant, Mr. Musgrave, having made default in payment of the interest and in keeping up the policies, the plaintiffs filed this bill for the purpose of obtaining payment, and for an injunction and receiver; on the 11th of January, 1840, an order was made, on affidavit, before answer, restraining the dean and canons from paying, and the defendant from receiving, the income of the canonry and for the appointment of a receiver.

The defendant, Mr. Musgrave, having put in his answer, it was now moved on his behalf, to discharge the order for an injunction and receiver.

Mr. *G. Richards*, in support of the motion, contended, that it was contrary to public policy to permit the assignment of ecclesiastical preferments like the present.

That the statutes of 13 Eliz. c. 20, and 14 Eliz. c. 11, s. 5., repealed by

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the 43 G. 3, c. 84, but partly revived *by the 57 G. 3, c. 99, [*546] though not strictly applicable to the present case, (there being here no cure of souls,) plainly showed that the policy of the law and the legislature were opposed to the assignment of property of this description.

That this was an office of an ecclesiastical nature having duties attached to it, namely, residence and attendance in St. George's Chapel, and on the non-performance of which; the income would be forfeited: and as the receiver could not perform these duties his appointment would therefore be nugatory. That the object of the appointment was to add dignity to the sovereign by the attendance of the canons in the Royal Chapel, and that on the same grounds of public policy which existed in *Davis v. The Duke of Marlborough*,(a) such an office was not assignable; in that case Lord Eldon said, that "a pension for past services may be alienated, but a pension for the supporting the grantee in the performance of future duties is not assignable." In the same way half pay is not assignable, future services being contemplated. In *Cooper v. Reilly*,(b) it was held that the salary of assistant parliamentary counsel to the treasury was not, on grounds of public policy, assignable, and that the court would not appoint a receiver of it. *Alexander v. The Duke of Wellington*,(c) was also cited.

Mr. Pemberton and Mr. W. T. S. Daniel, contra, contended, that it did not appear whether this was an ecclesiastical appointment or not, but it was confessedly one without cure of souls, and considering the alleged duties, *was a mere sinecure income, assignable like other property. [*547] That there existed no rule of public policy, independent of the restraining statutes, which prevented an ecclesiastic from dealing with his temporalities. *Metcalfe v. The Archbishop of York*,(d) That the case of *Cooper v. Reilly* did not apply; in that case there was no patent place, no permanent office, but a right to receive an annual salary for certain duties, in default of the performance of which, no salary was payable; that it was manifest that such duties could not be performed by a receiver; and that this must have formed the ground of the decision on the motion, though in truth that case had never been decided on the merits.

That even a living with cure of souls could be sequestered, and the profits taken by a creditor; and it would be strange indeed, if an office like this, without any further duties than residence and attendance at church, should be exempted from the usual legal remedies.

That it did not appear that any forfeiture would be insisted on by the other canons, and the receiver would at least be able to receive the income of 25*l.* which was payable on all events.

Mr. Richards, in reply. A living may be sequestered; the profits are then taken by operation of law under the superintendence of the bishop, but an

(a) 1 Swan. 79.

(c) 2 Russ. & Myl. 35.

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(b) 2 Simons, 560; and 1 Russ. & Myl. 560.

(d) 6 Sim. 224; and 1 Myl. & Cr. 547.

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assignment of it is wholly void. The point in this case is not whether the canonry can be taken under a judgment, but whether it is assignable.

[*548] *THE MASTER OF THE ROLLS :—The plaintiffs, being under the necessity of filing this bill, in consequence of the neglect of the defendant to pay either principal or interest on the money advanced, have obtained an order for a receiver. I do not enter into the question whether the order was opposed at the time, for the defendant had clearly a right to pursue any course he pleased upon that occasion, and supposing him to have then thought, or to have been then advised, that this order was proper, still it was perfectly competent for him afterwards, upon a more careful inquiry, to bring under the consideration of the court the question, whether the order ought to be sustained. It is now contended that the order should be discharged on two grounds; the first is, that it is an order which cannot be enforced for any useful or profitable purpose to the plaintiffs without the assent and concurrence of the defendant, Mr. Musgrave. Mr. Musgrave, being a canon of Windsor, has, it is said, a duty to perform, that is, he is to reside twenty-one days within the precincts of the castle of Windsor, and during that time he is to attend divine service, and if he does not, the aliquot share or part of the general revenues of the corporation which he would otherwise be entitled to, is to be reduced to a certain small sum. He therefore says, "If I do not choose to attend during that time, the small sum only, and not the larger sum, will have to be received, and therefore the plaintiffs and the receiver will be unable to receive the income for the purpose of applying it in diminution or in exoneration of my debt." It cannot be supposed that Mr. Musgrave will be so unwise, as, rather than give the plaintiffs the benefit of that which they are clearly entitled to, wholly to neglect to perform the duty which entitles him to the receipt of this income, and thus [*549] leave the debt standing, and the *interest accumulating upon it. I cannot presume that any such degree of absurdity will mark his future conduct.

In the next place it is said that he has no right to assign this canonry, because the share of the revenues was given to him in consideration of certain future duties to be performed. Now if it had been made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various cases in which public duties are concerned, in which it may be against public policy, that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested, not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half pay where there is a sort of retainer, and where the payments which are made to officers, from time to time, are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for per-

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forming their duties. If, therefore, they were permitted to deprive themselves of their half-pay, they might be rendered unable promptly to enter upon their duties when called upon, and the public service would be thereby greatly injured. So also, where a pension or remuneration is given for a purpose which tends less directly to the public benefit, as for instance was the case in *Davis v. The Duke of Marlborough*; there the pension was given to the Duke of Marlborough as a memento of the gratitude of the nation, and as a reward for his distinguished public services; and it was there the intention of the legislature that it should be kept in mind that it was for *those great services it was given. In that case the pension was [*550] held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services would be entirely lost; and so in the course of that case Lord Eldon said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office. With respect to the case of Cooper and Reilly, some doubts have been expressed as to the propriety of the decision on the motion for a receiver; but the question was whether the salary was assignable on grounds of public policy, and that depended on the nature of the duty and the interest of the public to secure the payment of the salary to the person by whom the duty was to be performed. If in this case the residence in Windsor Castle, and the attendance on divine service had been stated in the answer, or in any way shown to be for the benefit of the public, or for the maintenance of the dignity of the Sovereign for the benefit of the public, I should have thought the case worthy of a very different consideration. But from all which is stated in this answer that is not the case; it is a service to be performed for the benefit of the party himself; and, therefore, upon the case as it now stands upon this answer, and without saying there may not be other facts which may be material to be ultimately considered, it appears to me that the security of the plaintiffs is valid, and I must therefore refuse the motion with costs.[1]

NOTE.—In [*Doe ex dem.*] *Butcher v. Musgrave*, [reported 1 Mann. & Granger, 644,] being an action by another mortgagee, the Court of Common Pleas, on the 23d June, 1840, *decided that an action of ejectment would not lie for the canonry in question, it being a [*551] mere office, of which the sheriff could not give possession; and that ejectment did not lie for the residentiary house in which the canon resided, as it appeared vested in the corporation, and not in the canon.

[1] Vide 1 Russ. & M. 562, n. 1. *Tunstall v. Boothby*, 10 Sim. 542.

1840.—Carter v. Bental.

CARTER v. BENTALL.

1840: May 4, 5, June 27.

A testator gave the income of his personal, and the rents of his real estate, to his daughter for life, for her separate use, and after her decease and the decease of his wife, he gave the residue of his real and personal estate to trustees, in trust to sell and pay half the produce "to the *issue*" of his daughter, equally, to be paid at twenty-one; and if only one *child*, then to such one *child*; and he directed the trustees to apply the interest in the maintenance and education of such issue; "and in default of *such issue*" he gave such moiety of the residue between his nephews and nieces living at the death of his daughter. And he gave and devised the other moiety of the residue of his estate at the decease of his wife and his daughter *without issue*, to the same trustees to permit his godson to receive the income for life, and after his decease to certain charities: Held, that "*issue*" in the first clause was to be construed "*children*;" but in the second clause in its ordinary unrestricted sense; and that consequently the gift over of the first moiety, upon the death of the daughter without issue was good, but was too remote as to the second.

The word "*issue*" in a will, held on the context to have two different meanings as to two moieties of a devised estate.

THIS cause was instituted for the purpose of carrying into execution the trusts of the wills of Thomas Mendham and of his daughter Sybilla Carter; and the question arising upon the construction of the will of Thomas Mendham, was whether certain limitations therein contained were void for remoteness.

At the date of his will the testator had a wife, Elizabeth, and a daughter Sybilla.

By his will, dated the 23d of March, 1810, the testator gave the dividends of his long annuities to his wife for life, and an annuity to his godson for life; and he "gave and bequeathed to his daughter, Sybilla Mendham, all the interest, dividends, income, and produce of his whole personal estate [*552] undisposed of by his will, and the rents, *issues*, and profits of his real and leasehold estates whatsoever and wheresoever, and of what nature or kind soever, for and during the term of her natural life, for her sole and separate use and benefit," and after directing his India bonds and Exchequer bills to be sold and invested, and the interest to be paid to his daughter for life, and after her decease to go along with the residue; the testator, after the decease of his wife and daughter Sybilla, gave, devised, and bequeathed the residue of his real and personal estate to trustees, and their heirs, executors, administrators, and assigns, upon trust to sell and invest the produce. The testator then proceeded as follows:—"And upon this further trust, to transfer and pay one moiety, or half part of the whole clear residue of my estate, whether in the public funds or on any other security, to the *issue* of my said daughter Sybilla, if she shall happen to marry and have any such, equally between them, share and share alike, and to be paid and transferred to him, her, or them at their respective age or ages of twenty-one years, and if only one *child*, then to such one *child* to and for his, her, or their res-

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pective advantage and benefit. And I order and direct my said trustees, &c., to lay out the dividends, interest, and profits thereof in the meantime in the maintenance and education of such issue, and the overplus (if any) to be in like manner laid out in the public funds for their use and benefit as aforesaid. And I do further direct my said trustees, &c., to transfer and pay the same to him, her, or them accordingly. And in default of such issue I give, devise, and bequeath the said moiety, or half part of the residue of my estate, unto and amongst all my nephews and nieces who shall be *living at the time of the decease of my said daughter*, in the shares following," which he thereupon stated; "and as to the other moiety or half part of the said residue of my estate after the decease of my wife and my daughter "Sy- [*553] billa without issue," the testator gave the same to his trustees in trust to permit Thomas Newson Mendham to receive the interest for life, and after his decease he gave it to Bartholomew's Hospital, St. Thomas' Hospital, the Society of the Sons of the Clergy at Ipswich, and the Haberdashers' Company, to enable them to relieve and assist their patients, aged and infirm and decayed members, and impotent persons, in their several and respective departments.

The testator's wife died in her husband's lifetime, and the testator died in 1812: his daughter Sybilla, who was his heiress at law and sole next of kin, proved the will, and in 1813 suffered a recovery of a moiety of the hereditaments, and declared the uses to herself in fee.

She married Mr. Carter in 1815, who died in her lifetime, and she died in 1835, without having had any child. The plaintiffs were parties claiming under her will.

Thomas Newson Mendham died in 1817.

Mr. *Pemberton* and Mr. *Roupell*, for the plaintiffs, as to the first moiety, contended that the gift over in default of issue of Sybilla was too remote; that it was consequently void as to the personal estate, and as to the real estate the effect would be to give Sybilla an estate tail, in order to let in her issue; otherwise, though she had children, the property would go over; they argued that this estate tail had been barred by the recovery, and passed under the will of Sybilla.

That as to the other moiety, there was no gift to her issue at all, but the gift over was upon her death "without issue, which gift, as [*554] in the case of the former moiety, was void for remoteness, and that the daughter took an estate tail therein by implication. [THE MASTER OF THE ROLLS:—The gift over of the first moiety is to the nephews *living at the death of the daughter*.] That would not limit the failure of issue to the issue born in the daughter's lifetime; *Barlow v. Salter*.(a) A gift to the issue, of the second moiety, as children, cannot be implied; *Greene v. Ward*;(b) they also cited *Jesson v. Wright*.(c)

(a) 17 Ves. 479.

(b) 1 Russ. 262.

(c) 2 Bligh, (O. S.) 1.

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Mr. *G. Turner* and Mr. *Hallett*, for the representatives of one of the testator's nephews, limited their argument to the first moiety, and contended that Sybilla took an estate for life only with remainder to her children, and that the gift over to the nephews and nieces, in default of such *issue*, must be interpreted in default of such *children*, and would therefore be valid. That the strict force of technical words might be modified by subsequent expressions, as occurred in the expression "heirs male of the body" in *Goodtitle v. Herring*,^(a) in the words "lawful issue" in *Cursham v. Newland*,^(b) in the words "heirs of the body" in *North v. Martin*,^(c) and "heirs of the body," and "heirs lawfully to be begotten" in *Lowe v. Davies*.^(d) That here the testator had declared his meaning of the word *issue* to be children, for in the subsequent sentence, he says, "and if only one *child*, then to such one *child*."

That "*issue*," therefore, must be construed "*children*," and that the [*555] gift over in default of children would "consequently be valid ; they also cited *Leake v. Robinson*.^(e)

Mr. *Hodgson* and Mr. *Spurrier*, for Bartholomew's Hospital, contended, that on the whole context of the will, the intention of the testator appeared to be that both moieties should go to the children of Sybilla, or, at all events, that they should go over at the same time to the persons to take under the ultimate limitation. That Sybilla could not take an estate tail, because her life estate was a legal estate, and the gift to her *issue* was an equitable estate, and consequently the rule in *Shelley's Case* would not apply, as no union could take place between a legal estate for life and an equitable remainder. That the construction would be different as to the real and personal estate ; and even if Sybilla took an estate tail in the real, she would only be entitled to an estate for life in the personal estate ; *Forth v. Chapman*.^(g) That, as to the first moiety, "*issue*" meant children ; and the gift over in default of *issue* (meaning children) would be valid, *Ellis v. Selby*,^(h) *Gawler v. Cadby* ;⁽ⁱ⁾ and as to the second moiety, that a gift to the children of the daughter must be implied, and it must be taken to have been the intention of the testator that it should go over at the same time as the first moiety ; they argued also that the word "*issue*" could not have two different senses in different parts of the same will ; *Goodright v. Dunham* ;^(k) they also cited *Porter v. Bradley*,^(l) *Gower v. Grosvenor*,^(m) *Trickey v. Trickey*,⁽ⁿ⁾ *Ellicombe v. Gompertz*,^(o) *Kevern v. Williams*,^(p) *Wilkinson v. South*,^(q) [*556] *Pinbury v. Elkin*,^(r) *Paine v. Stratton*.^(s)

Mr. *Bethell* and Mr. *J. Evans*, for St. Thomas' Hospital.

(a) 1 East, 264.

(c) 6 Sim. 266.

(g) 1 P. Wms. 663.

(k) 1 Douglas, 251.

(n) 3 Myl. & K. 560.

(q) 7 Term, R. 555.

(s) Cited in *Read v. Snell*, 2 Atkins, 647.

(b) 2 Bing. N. C. 58 ; 4 Mee. & W. 101 ; and ante, 145.

(d) 2 Lord Raymond, 1561.

(h) 7 Sim. 352.

(j) 3 Term R. 143.

(o) 3 Myl. & Cr. 127.

(r) 1 P. Wms. 563.

(e) 2 Mer. 363.

(i) Jacob, 346.

(m) 5 Mad. 337.

(p) 5 Sim. 171.

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Mr. *Tinney* and Mr. *Matthews*, for the Sons of the Clergy, cited *Sibley v. Perry*.(a)

Mr. *Randall*, for the Haberdashers Company, cited *Swift v. Swift*.(b)

Mr. *Wray*, Mr. *Spence*, Mr. *G. Russell*, and Mr. *Rudall*, for other parties.

Mr. *Pemberton*, in reply.

June 27.—THE MASTER OF THE ROLLS :—This cause was instituted for the purpose of carrying into execution the trusts of the wills of Thomas Mendham and of his daughter Sybilla Carter, and the question reserved, arising upon the construction of the will of Thomas Mendham is, whether certain limitations therein contained are void for remoteness.

At the date of his will the testator, Thomas Mendham, had a wife Elizabeth and a daughter Sybilla. [His Lordship stated the limitation of the first moiety.]

*The clause thus stated is a distinct gift to the issue of his daughter, of a moiety of the residuary estate after the deaths of the wife and daughter; and I am of opinion, that the use which the testator has made of the words "only one child," and "such one child" shows that by the word "issue" in this clause he meant "children," and that the gift is of a moiety to the children of Sybilla, and in default of such children to the nephews and nieces, and consequently that the gift over is good; and this construction appears to me to be strengthened by other expressions which are used in the same clause. [*557]

The testator having thus disposed of one moiety, expresses himself as follows:—And as to the other moiety or half-part of the said residue of my estate, (after the decease of my said wife and my daughter, Sybilla, *without issue*;) I give and devise the same to the same trustees, to permit and suffer Thomas Newsom Mendham to take and receive the interest and dividends thereof for life, in lieu of the dividends before given to him;" and after his decease to certain charities therein named.

This last moiety being given after the decease of Sybilla without issue, the gift over, *prima facie*, is too remote; and the question is, whether there is any thing in this will to prevent the adoption of that construction. The testator was contemplating the time of his daughter's death: upon that event, he directed one moiety of his residuary estate to be severed from the other, and he disposed of the two moieties by distinct clauses in his will; in one he made a distinct gift to the issue of his daughter, in terms from which it is to be collected, that he meant a gift to her children, and in effect, makes a gift over upon her death without children; in the other he makes no distinct gift to the issue or the children of his daughter, but makes [*558] a gift over on the death of his daughter without issue; and it is ar-

(a) 7 Ves. 523.

(b) 8 Sim. 168.

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gued, that the testator must have intended a gift of the second moiety to the children of his daughter, and if that construction cannot be maintained, still that the gift over of both moieties must have been intended to take effect on the same event, and that the word "issue" must have the same meaning in both clauses.

It is certainly difficult to suppose that the testator can have really meant that, which appears to be the legal import and effect of the words of his will, or that he can have intended to use the word "issue," in different senses in the two clauses; but as he has in one case made a distinct gift to the issue, and in the other he has not,—as in the clause containing the gift to issue, he has in the immediate context, used words which explain the word to mean children, in the other he has not,—as in the last clause there is not, between the death of the daughter, and the limitation over, any prior limitation, upon the failure of which the limitation over is to take effect, it appears to me, that I cannot upon any safe principles imply the gift to issue or children where it is omitted, or give to the word "issue," without an explanatory context, or any reference to a prior limitation, the same effect as is or might be given to it when accompanied by an explanatory context, or preceded by a prior limitation, the objects of which might qualify its general meaning.

The word "issue" may, and does often mean children, and more than children. The testator in one place accompanies the use of the word by expressions, which signify that on that occasion he means children only; but it does not follow, that in another place where the word is not accompanied by such expressions, the same limited meaning is intended; and in this clause, and with reference to this half of the residue, there is no prior limitation in favor of particular objects, beyond whom the meaning of the word might be held not properly to extend.

And on the whole I think that the gift over in the second clause is too remote, and cannot take effect as to any part; if it were good as to the purely personal property, it could not in favor of the charities be good as to the real estate or chattels real.[1]

Vide Jac. 348, n. 1. 2 Sim. & Stu. 470, n. 1 *Ellicombe v. Gomperts*, 3 Myl. & Cr. 127, 153, n. 1. *Douglas v. Congreve*, 1 Beav. 59. *Pond v. Bergh*, 10 Paige, 141, 155. *Garratt v. Cockerell*, 1 Yo. & Coll. C. C. 494, 500. *Leeming v. Sherratt*, 2 Hare, 14.

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THE SOCIETY FOR THE ILLUSTRATION OF PRACTICAL KNOWLEDGE v. ABBOTT AND OTHERS.

1840: June 1.

Four projectors of a public company obtained a charter, by which they, and all persons who might become subscribers, were incorporated. The capital was declared to be 20,000*l.*, which was to be divided into 400 shares. Before any other subscribers had joined, the four projectors, of common assent, divided the 400 shares amongst themselves, accounting to the corporation (as was alleged,) for 12,000*l.* and not 20,000*l.* They afterwards disposed of the shares. A bill being subsequently filed by the corporation against the projectors, impeaching the transaction, and to compel them to pay the full consideration :—Held, that though at the time they were the only persons interested in the company, yet it was not competent for them to take the shares without paying the full consideration.

On a bill by an incorporated company against the four projectors of it, to compel them to account to the company for the value of shares which they had appropriated to themselves, without, as was alleged, having paid the full consideration :—Held, that the individual shareholders need not be made parties.

Distinction between a corporation and the aggregate of the members forming such corporation.

THIS suit was instituted in the name of the Society for the Illustration and Encouragement of Practical Science, (an incorporated company,) against P. H. Abbott, J. S. Brickwood, J. Shaw and Anne C. Watson the widow and personal representative of Ralph Watson.

The bill in effect stated, that previous to 1832, Abbott, Brickwood, Shaw and Watson (deceased) *projected the formation of a company [*560] for the public exhibition of a collection of scientific works and specimens of new inventions and improvements, and they agreed to enter into partnership for that purpose, and to invite other persons to join them.

That, in 1832, they contracted for the lease of the Adelaide Gallery, purchased models, &c., and shortly afterwards opened it for public exhibition. That shortly afterwards, but previously to 1834, Telford and Giles agreed to become partners and take some shares, if they could be secured from liability beyond the amount of their several interests therein; and for limiting the liability of subscribers to the undertaking, Abbott, Brickwood, Shaw, Watson, Telford and Giles obtained a charter of incorporation, dated the 13th of October, 1834, whereby, after reciting that these six gentlemen had, on behalf of themselves and others, humbly represented to his Majesty that they, together with several other persons, being desirous of forming a society to be called "The Society for the Illustration and Encouragement of Practical Science," had subscribed considerable sums of money, and had erected a gallery for the publication of discoveries and inventions in science and arts, these six gentlemen, together with such other persons as had become, or should at any time thereafter become, subscribers to the capital or stock thereafter mentioned, were incorporated under the name aforesaid, with perpetual succession and a common seal; and it was thereby declared, that the capital of the society should be the sum of 20,000*l.*, divided into 400 shares of 50*l.* each; and the charter provided for general meetings, and declared that the majority of

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proprietors present at any such general or special meeting, should finally determine upon all resolutions relating to the affairs and government of [561] the said society; and it *directed that Telford, Abbott, Brickwood, Shaw, Watson and Giles should be the first managers of the society; it provided for the election of future and additional managers; and the councils, of not less than three managers, had power to direct and manage the affairs of the society, conformably to the rules and bye-laws, and to enter into contracts, and execute assignments, &c., and do all other acts to which the corporate seal was required to be affixed, and generally to act in the management of the society and affairs thereof, "which said matters and things should be as binding upon the said society as if the same were done by the whole corporation."

At the time of granting the charter, Abbott, Brickwood, Shaw, and Watson were the only persons who then held any shares in the society; but Telford and Giles had promised to take five shares each if the charter was granted. That soon after the granting of the charter, Abbott, Brickwood, Shaw, and Watson caused to be prepared 400 shares of 50*l.* each, amounting together to 20,000*l.*; and they agreed to appropriate the whole number equally among themselves, and to resell the same or so many thereof as they might think proper, for their own private benefit, charging themselves with the whole capital of 20,000*l.* directed by the said charter to be subscribed by the proprietors of the said society; and they further resolved, as four of the managers of the said society appointed by the charter, to adopt, for and on behalf of the society, the purchases by them previously made, and the other proceedings taken in the establishment of the gallery and exhibition thereinbefore mentioned, and to take credit in account with the society, for the capital sum by them alleged to have been invested in making such purchases, and [562] in establishing such gallery or exhibition, and in procuring the *incorporation of the society; and they resolved to represent the capital sum, so by them alleged to have been invested, as amounting to 16,000*l.*; and they paid and deposited the sum of 4000*l.*, and no more, into the hands of the bankers of the society, which two sums of 16,000*l.* and 4000*l.* made together the sum of 20,000*l.*, the capital or joint stock of the society.

That from the incorporation of the society until February, 1835, Abbott, Brickwood, and Shaw, together with Watson, down to his death, managed all the affairs of the society in a private manner, without any interference on the part of Telford or Giles, or any other person. That Telford died soon after the charter of incorporation had been granted, and soon after Abbott, Brickwood, Shaw, and Watson transferred to Telford's executors five shares in the society for 250*l.*, and also transferred other five shares to Giles for a like sum, which two sums of 250*l.* they appropriated to their own use, and they also sold other shares to other parties, so that the whole number of shares which were sold before February, 1835, was 160, and they appropriated all the money received for these shares to their own use. That previously to

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February, 1835, Watson died, and his widow, the defendant, Anne C. Watson, was the executrix of his will, and that Abbott, Brickwood, and Shaw appropriated to themselves all Watson's shares, on account of a debt which they alleged to be due to them from him. That in February, 1835, Abbott, Brickwood, and Shaw entered in the books of the society 35 shares in Abbott's name, 5 in the name of Abbott's wife, 35 in Brickwood's name, and 5 in the name of his wife, and 20 in Shaw's name, and 160 in the names of different purchasers, and the remaining 140 in the joint names of Abbott, Brickwood, and Shaw.

*That the first council of the managers was held on the 23d of [*563] January, 1835, at which Abbott, Brickwood, Shaw, and Giles were present, when the seal of the society was affixed to a lease, by which the Adelaide Gallery was demised to the society for ninety years from Christmas, 1833, at the rent, for the first year, of 765*l.*, and for the subsequent years of 898*l.* That the first general meeting of the society was held on the 18th of February, 1835, when Abbott, Brickwood, Shaw, and eight other proprietors of shares attended; that Brickwood acted as chairman, and read the charter to the meeting, and then entered into a statement of the circumstances and prospects of the society, and informed the meeting that the full amount of the capital of 20,000*l.* directed by the charter had been raised and subscribed by the original proprietors, and that of such capital, part, amounting to 16,000*l.*, had been invested in the purchase of the furniture, fixtures, models, philosophical apparatus, and other effects, whereof an inventory was then produced, and in defraying the other necessary expenses incident to the first establishment of the institution, and in procuring the incorporation thereof, and that the remainder of such capital, amounting to 4000*l.*, was then deposited in money in the hands of the bankers of the society. That the meeting placed implicit confidence upon the honor and integrity of Brickwood and his coadjutors, and did in fact believe that the *bona fide* cost of establishing the society and furnishing the gallery was 16,000*l.*; and that upon the faith of such representations, the members of the society, at the first general meeting, passed a resolution, declaring their approbation of the statement made to them by Brickwood. That at this first meeting seven additional managers were appointed, who occasionally attended the meetings of the council, but the three first named *defendants took the chief part in the manage- [*564] ment of the concern.

That from 1835, to 1838, the affairs of the society appeared to be in a flourishing condition, and considerable dividends were declared, but that in the latter part of 1838, it was discovered that the whole profits of the society had been exhausted in making former dividends, without providing for current expenses, and that the reserved capital of 4000*l.* deposited in the hands of the bankers had been improperly resorted to, and was much reduced in amount; and that the whole sum of money expended by Abbott, Brickwood, Shaw, and Watson, in the purchase of fixtures, furniture, instruments, and

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apparatus, and otherwise in making the aforesaid gallery, and establishing the society, including all allowances proper to be made in calculating the same, did not exceed the sum of 8000*l.*; and that at the respective times of granting the charter of incorporation, and of the first general meeting of the society, the entire value of the furniture, fixtures, models, philosophical apparatus, and other effects, whereof an inventory was produced at the first general meeting, did not exceed the sum of 3500*l.*, and that Abbott, Brickwood, and Shaw, in representing the furniture, fixtures, models, philosophical apparatus and other effects, together with the leases and adaptation of the premises and establishment of the institution, as having cost the full amount of 16,000*l.*, were guilty of a false and fraudulent representation; and that under cover of such misrepresentation, they had withheld and converted to their own use the sum of 8000*l.* or upwards, part of the capital of the society.

The bill prayed that an account might be taken of the number of [*565] shares in the capital of the society, which, *after the incorporation of the society, were appropriated by or to Abbott, Brickwood, Shaw, and Ralph Watson respectively: and of the amount of capital which, at the time of the appropriation of such respective shares and in consideration thereof, ought to have been paid or subscribed by the said last named defendants and Ralph Watson respectively to the funds of the society: and of all sums of money paid, subscribed, or otherwise satisfied to the society by the said last named defendants and Ralph Watson respectively, in respect of the capital sum due from them or any of them upon their respective shares; and that in taking such accounts, credit might be allowed to Abbott, Brickwood, and Shaw respectively, and to the estate of Ralph Watson, for all sums of money by them respectively properly advanced or expended on behalf of the society before the incorporation thereof; and that it might be declared that the society was not bound by the resolution of the general meeting in February, 1835; and that Abbott, Brickwood, and Shaw might respectively be decreed to pay to the plaintiffs, what, upon taking such accounts, should be found due to the plaintiffs from the said last named defendants respectively, and that Mrs. Watson might be decreed to pay to the plaintiffs, out of the personal estate of Watson, what, upon taking such accounts, should be found to be due to the plaintiffs from the estate of Watson.

To this bill Abbott and Shaw demurred for want of equity, and also for want of parties, on the ground that the wives of Abbott and Brickwood, and the other original shareholders in the bill mentioned were necessary parties.

Mr. *Tinney*, Mr. *Bethell*, Mr. *Walker*, and Mr. *Hetherington*, in [*566] support of the demurrer:—By the *arrangement complained of, no injury was done to the parties who now seek redress; the act now questioned was done by all the members of the corporation, who had then full power of dealing with the corporate property as they pleased. The injury done by themselves as individuals was sustained by themselves as forming the corporation. Telford and Giles are not alleged to make any com-

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plaint and are not parties; besides this, the act was afterwards confirmed by the council of managers and by the general meeting. *Hichens v. Congreve*,^(a) differs materially from the present case; there the directors sold land to the company at a higher price than they had given for it, and they were compelled to account for the difference between the two sums; there, the directors were trustees for their co proprietors: but in this case they were responsible only to themselves, and they exonerated themselves from any liability which they had subjected themselves to; the parties interested in having an account taken are the other shareholders, and they are not before the court. If the four originators of the society are accountable, it must be on the ground of misrepresentation, and not on account of the division of the shares among themselves; the individuals, therefore, who were deceived, and not the corporation, are the proper parties to apply to the court for relief: at all events, they are necessary parties to the suit.

Mr. *Pemberton*, Mr. *G. Richards*, and Mr. *R. Palmer*, in support of the bill:—The division of the shares was not an act of the corporation, but an act of the individual shareholders. The bill does not impeach that division, but seeks to have the arrangement completed by paying the full price.

*All the shareholders are represented by the corporation, they are [*567] all before the court, and therefore the objection for want of parties, is not valid; they cited *The Charitable Corporation v. Sutton*.^(b)

THE MASTER OF THE ROLLS:—This bill alleges, that four persons, being at that time the managers and the only members of the corporation, purchased for themselves all the shares into which the property of the corporation was to be divided, without paying the just price for them; and the bill which has been filed by the corporation prays, in substance, that an account may be taken of what they ought to have paid, and for payment of the amount. This I apprehend to be the substance of the bill, though it is complicated in its frame. Whether fraud has or has not been practiced, is not now a matter for the consideration of the court, the only question now being, whether upon the allegations of fraud which are contained in this bill, the plaintiffs are entitled to have an answer from the defendants. A great deal of confusion has almost unavoidably arisen in the course of the argument, by not distinguishing the corporation or corporate body from the individual persons, who at one time seem to have constituted not the corporation, but all the members of the corporation.^(c) Unless such a distinction be observed, it would be impossible to come to any thing like a satisfactory conclusion upon this occasion. The four gentlemen who have been mentioned seem to have been engaged in the meritorious speculation of collecting together objects of science for exhibition. They commenced it as a private speculation, but after they had proceeded for some time, they were desirous of *as- [*568]

(a) 4 Russ. 562, and 4 Sim. 420.

(b) 2 Atk. 400.

(c) See *Bligh v. Brent*, 2 Younge & C. 295.

sociating with them two other persons. These, however, objected to come into the concern, unless they were exonerated from any liability, beyond the amount for which they pledged themselves, by any subscription they might think fit to make. As this could only be done by a charter of incorporation, one was accordingly applied for and obtained, and it was certainly granted upon the supposition that a capital to the amount of 20,000*l.* was to be raised, and that the undertaking was to be carried on for the purposes stated; it was upon this understanding that the peculiar privileges which belong to chartered corporations were granted. Now it is distinctly stated in this bill, that the only persons who were at that time interested, were the four persons named. That being so, it is alleged in argument, that they had a right to do what they pleased with respect to that which was to become the property of this corporation, that is, in respect of these shares; and that if, on the one hand, they had the power of incurring responsibility, they had, on the other hand, the power in that way of discharging themselves from it. I confess I cannot concur in that argument. They were then the only members of the corporation, and taking it for the present, that being such only members, they had a right to do what they pleased with the property of the corporation, without proceeding to the extent of destroying the corporation; yet had they a right to act in a manner totally inconsistent with this charter of incorporation, and at the same time continue to act as if the charter of incorporation were valid—to hold out to the world that it was valid, and to sell shares upon that supposition? I apprehend they were bound to look to the continuance of the corporation, and to the conditions and terms on which it was originally founded; and that, in continuing it, they could not discharge themselves from the liability of the conditions affecting the [*569] rights of all who might afterwards become members of the corporation. A man with regard to his own estate may act as he pleases; he may, as it has been said in argument, take from one pocket and put into another: but that is not the case with these persons. They were the only managers and the only members of the corporation, and what is alleged upon this bill is, that they determined to become the owners of all the shares; their right to do so is not disputed by the plaintiffs, but what they say is this, "You might, if you pleased, have become the owners of all the 400 shares, but if the corporation was to continue, then you were bound to give to the corporation the value of those shares, or 20,000*l.*; but you have not done so." This is the question to be determined in this cause. The defendants, on their part, say we have laid out money in the purchase of models, furniture, &c.: in the alteration of the premises: and in carrying on the undertaking, until we had established and made it very valuable; our outlay and expenses amounted to 16,000*l.*, we have added 4000*l.*, and by delivering the models, &c. to the corporation, and by paying the 4000*l.* we have become the purchasers of 400 shares. If the facts were so, it is not disputed by the plaintiffs that the transaction was right, but the truth of that allegation cannot be

 1840.—*The Society of Practical Knowledge v. Abbott.*

brought into discussion upon this demurrer. The plaintiffs allege by the bill that the expenditure did not amount to the 16,000*l.*, and if not, the result simply is, that the amount of the expenditure, together with the 4000*l.* which was the whole consideration paid for the 400 shares, was much less than their value. It is distinctly stated by the bill that the four persons bought the whole 400 shares from the corporation :—that they as individual members of the corporation acquired them, without, according to the allegation in this bill, having paid into the corporation fund the value of them.

*This transaction was effected amongst themselves very soon after [*570] the charter of incorporation was granted, and I do not find any body else acting on that occasion. There appears to be an entry of the agreement in the ledger, in which they expressly charge themselves with the sum of 20,000*l.*, and discharge themselves by the 16,000*l.* already expended and the 4000*l.* paid by them into the bankers of the company. At the first council, held on the 23d of January, 1835, and at the first general meeting, which took place on the 18th of February, 1835, they stated that they had paid 20,000*l.* for the shares in the same way, viz : 4000*l.* in money and 16,000*l.* in expenditure. The bill, however, alleges that at the time that meeting took place, faith was given to these representations ; they were considered to be entirely true, and every body, therefore, concurred in allowing the transaction to stand : that is, believing that the full consideration for the 400 shares had been paid, they consented to the matter proceeding upon that footing ; but upon an investigation of the accounts and of these different matters, it afterwards appeared that the sum of 16,000*l.* had never been advanced in this form at all ; that not more than 8000*l.* had been advanced, and the other 8000*l.* had never been accounted for to the corporation at all. The question therefore is, whether, upon a bill containing these allegations, the plaintiffs have not a right to an answer ? Whether there was such a fraud or not, I have not at present the means of knowing. I can conceive many ways in which the sum of 16,000*l.* might have been honestly and properly paid up, and for anything I know to the contrary, that really may have been the case ; but it does appear to me on the facts I have stated, that these defendants ought to answer this bill.

*It is to be observed that the transaction which is impeached, is a [*571] transaction between these parties as individual managers on the one hand, and the corporation on the other ; and that no transaction as between these parties as the owners of shares, and the persons who purchased from them is in any way in dispute in the present bill ; the latter are not therefore necessary parties to the suit.[1]

An appeal was presented to the Lord Chancellor, but the case was afterwards compromised.

[1] Vide *Briggs v. Penniman*, 8 Cow. 395. *Robinson v. Smith*, 3 Paige, 222. *Walker v. Devereaux*, 4 Paige, 229. *Blain v. Agar*, 1 Sim. 37, 44, n. 1. *Preston v. The Grand Collier Dock Co.*, 11 Sim. 327.

 1840.—Whiting v. Force.

WHITING v. FORCE.

1840: June 2.

A testator gave his residuary estate to his wife for life, and to be divided amongst and paid to his children on the whole of them attaining twenty-one and not before, but the payment to be postponed till the death of their mother; and he directed maintenance to be allowed them in the event of the wife's death while the children were under twenty-one; there was a gift over to the children of any child who *should die before receiving his share*, and the testator provided that in case any of his children should die without leaving issue, his share should go over to the survivors. A child attained twenty-one after the widow's decease, but died without issue before receiving her share: held, that her representatives, and not the surviving children were entitled to her share.

THE testator in this cause, by his will, dated in March, 1826, gave the residue of his estate to trustees, upon trust to invest the same, and pay the income to his wife for her life; and he declared that it was his will that the estate should only be divided among his children on the whole of them attaining the age of twenty-one years, and not before that period; and should the whole of his children attain the age of twenty-one years during the lifetime of their mother, then the payment of their respective shares should stand over until their mother's demise. He then gave directions for the [*572] maintenance and advancement of his *children in the event of the death of his wife before his children attained the age of twenty-one years. And on the death of his wife, and on the whole of his children attaining the age of twenty-one years, then he directed his executors to divide, pay, transfer, or assign the whole of his estate unto and among his children in equal shares. And in case any one of his children should die *before receiving his or their share*, then he directed the same to be paid to any child or children which he, she or they should leave behind them, so that *such issue* should receive their deceased parent's share; provided always, that *in case any of his said children should die without leaving lawful issue*, then he directed that such parts or shares of him, her, or them, should go and accrue to the survivors or the issue of those surviving, and to be equally divided amongst such surviving children, or their issue, in the same manner as the share or shares of those dying were in his will before declared to be payable.

The testator died in April, 1826, leaving his wife and three children surviving him; the widow afterwards died, and Rosetta, the youngest child, attained twenty-one in October, 1839, after the widow's death; in December, 1839, Rosetta intermarried with Mr. Beecher, and died in January, 1840, without issue; her husband took out letters of administration to her estate.

Previously to her death, a suit had been instituted by the three children of the testator against the surviving executor, and the fund had been paid into court; but Rosetta had not, at her death, *received* any part of her share.

A supplemental bill having been filed on her death, the cause came

1840.—Moore v. Elkington.

on for hearing, and the question was, "whether, by the death of Ro- [*573]
setta without issue, before payment of her share, it went over to the
two other children.

Mr. *Pemberton* and Mr. *Bacon*, for the plaintiffs, the two other children,
cited *Hutcheon v. Mannington*, (a) *Gaskell v. Harman*, (b) 1 Roper on Lega-
cies, 517.

Mr. *Kindersley* and Mr. *Hardy* for Mr. *Beecher*, Mr. *Spence* and Mr.
Wright, for the executor; and Mr. *Craig*, for a purchaser, were not called
on by

THE MASTER OF THE ROLLS, who said, it appears to me that the gift over
to the other children does not take effect in this case.

The testator intended, and has distinctly directed, his estate to be divided
amongst all his children on the whole of them attaining twenty-one, and not
before that period. Under that direction the duty of the trustees to pay, and
the right of the legatees to receive, accrued at the moment when the testator's
youngest child attained twenty-one. He then goes on to say, that "in case
any one of his children should die before receiving his or her share," then it
was to go to the children which such child should leave behind, and if there
should be none, it was to go over to the surviving children of the testator.
The word "receive" must be construed with its co-relative "pay;" and there-
fore the right to receive and the duty to pay occurred at the very same time;
I cannot imagine, then, that it was the intention of the testator, if one of his
children having become entitled to receive a share of this property asked for
payment, but happened to die without receiving it, that this accident
"was to alter the destination of the fund. I am of opinion, therefore, [*574]
that the gift over did not take effect.

See *Mocatta v. Lindo*, 9 Simons, 56, [58, n. 1. *Watson v. Hayes*, id. 500, 501, n. 2. (At the com-
mencement of which note, two lines are transposed.) *Law v. Thompson*, 4 Russ. 92. *Vaudry*
v. Geddes, 1 Russ. & M. 203, 208, n. 3. *Blease v. Burgh*, ante, 221, 225, n. 1. *Ring v. Hard-*
wicke, ante, 332. *Leeming v. Sherratt*, 2 Hare, 14. *Drake v. Pell*, 3 Edw. Ch. Rep. 251.]

MOORE v. ELKINGTON.

1840: June 8.

One decree was taken in several suits. An abatement afterwards occurred: Held that one bill of
revivor was sufficient.

ONE decree was taken in three suits, of *Bond v. Frowd*, *Moore v. Frowd*,
and *Moore v. Abbott*, (c) after which there was an abatement by the death of
Bond, the plaintiff in the first, and a defendant in the other suits; upon this one

(a) 1 Ves. jun. 366.

(b) 11 Ves. 489.

(c) 3 Myl. & Cr. 45; and 2 Keen, 242.

 1840.—*The Attorney General v. Kell.*

bill of revivor was filed against Elkington his personal representative, praying a revivor of the several suits; it now came on for hearing.

Mr. *Pemberton* and Mr. *Heathfield*, for the plaintiff.

Mr. *Willcock*, contra, objected that there ought to be separate bills of revivor in the several suits, but

THE MASTER OF THE ROLLS considered that, as there was but one decree in the three suits, one bill of revivor was sufficient.

[*575]

*THE ATTORNEY GENERAL v. KELL.

1840: June 10.

A fund was raised by voluntary subscription by the inhabitants of Lewes and its neighborhood, and applied in the purchase of premises for making a pest-house, and the trusts were declared accordingly. In 1808 the trustees, under a resolution of the inhabitants at a general meeting, sold the premises, and lent the produce to the commissioners of lighting and paving on the security of the rates. Neither the principal nor interest having ever been repaid: Held, upon an information by the Attorney General, that this was a charitable foundation:—that a breach of trust had been committed:—and that the money ought now to be repaid by the commissioners out of the rates, though by the act empowering the commissioners to raise money on the rates one twentieth of the principal was to be paid off annually.

In the year 1742, there being no hospital in the town of Lewes, the inhabitants and the gentry of the neighborhood raised by subscription the sum of 421*l.* 10*s.* for the purpose of establishing one. 200*l.*, part of the sum so raised, was applied in the purchase of premises, which, on the first of November, 1742, were conveyed to twenty-four trustees, “in trust that when any person or persons should at any time thereafter happen to fall sick of the small pox or any other infectious distemper within the limits of the borough of Lewes, or within the liberty of the castle thereof, or in any of those houses without the limits of the borough of Lewes aforesaid, called the Spittal houses, lying in the parish of St. Ann, or in any of the houses which lie in the said parish eastward of said Spittal houses towards the said borough, that then the said messuage and premises should be used and employed for an hospital or pest-house to receive such person so infected as should be nominated and appointed by the said trustees, or the majority of them, together with the constables of said borough for the time being:” the remainder of the money was employed in converting the premises into a pest-house, and in providing necessary materials and furniture.

In 1792, the premises, being considered useless as an hospital, as well as unsafe, from the neighborhood which in the course of years had [*576] grown up round it, “ceased to be so applied, and the furniture which had belonged to it was sold by the then constable of the town, and the premises were let to the parish officers.

In 1808, under a resolution at a general meeting of the inhabitants of Lewes,

1840.—The Attorney General v. Kell.

the property was sold to the parish of St. Ann for 450*l.* and was conveyed by the trustees to Turner, a trustee for the parish of St. Ann. The purchase money was thereupon paid to the commissioners of lighting, paving, and cleansing the town, who under the powers contained in a local act of Parliament, executed a security on the rates to three persons as trustees for the sum of 450*l.*, with interest. Turner about the same time, conveyed the premises to the churchwardens and overseers of the parish for a term of 1000 years, and covenanted to convey the inheritance and levy a fine thereof to them. By a declaration of trust made between the surviving trustees of the first part, the constable of Lewes of the second part, Turner of the third part, the mortgagees of the rates of the fourth part, and the churchwardens and overseers of the fifth part; it was declared that the trustees of the 450*l.* should stand possessed thereof and of the interest, to dispose as well of the said interest as principal money in such manner as should be required by the said trustees and constables for the time being, or a majority of them, in purchasing, erecting, or hiring, and maintaining a proper place of reception for persons laboring under the small pox or any other infectious distemper, as was limited, expressed, and declared in the said indenture of 1st November, 1742, or for such other purposes as in the judgment of the said last mentioned trustees and constables for the time being, or a majority of them, might best contribute to guard against the introduction or spreading of such infectious distemper within the said borough and parts adjoining. And, [*577] in the mean time, in trust to indemnify the parish officers of St. Ann, or the persons for the time being possessed of the said term of 1000 years, from all disturbance in, or eviction from the possession of the said premises, and all claims in respect thereof out of the said sum, as the said trustees, constables, and churchwardens, and overseers of St. Ann for the time being should direct.

By the paving act in question, (46 G. 3, c. 43,) the commissioners were empowered to borrow not exceeding 2100*l.* on the rates, and were to pay interest on the money, and one twentieth of the principal yearly. The first payment of which was to be made at the expiration of six months from the time of making each mortgage.

No part of the 450*l.* or the interest had ever been paid. This information was filed against the clerks of the commissioners, the surviving trustees and the constables, praying an account of what was due upon the mortgage debt of 450*l.*, and for a declaration that the commissioners were bound to repay the same; and if they should not admit assets sufficient, then that they might be directed forthwith to take such steps as by the provisions of the act were lawful and necessary for the purpose of raising a sufficient sum to repay said mortgage debt and interest, and for a scheme.

Mr. Pemberton and Mr. Blunt, in support of the information, contended that this was an established charity: that the inhabitants had no power of destroying, or of applying, for the benefit of the rate payers of the town, that

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which was intended for persons afflicted with disease. That lapse of time was no bar to a charity, especially where, as here, the parties had all notice of the trust.

[*578] Mr. *Renshaw* for the trustees.

Mr. *Kindersley* and Mr. *Allfrey*, for the commissioners, contended that this was not a charitable foundation, but a private and voluntary arrangement of the inhabitants, with which the Attorney General had no right to interfere; and that the inhabitants had, if they chose to exercise it, the full control and right of varying the application. That the establishment having become unnecessary, and there being no funds to support it, it would be useless to re-establish it; that the intention was to benefit the town, and the hospital having for many years prior to 1806, by reason of the introduction of vaccination become useless, it was a proper application *cy-pres* of the fund to devote it to cleansing the town, and by increasing its salubrity, prevent the introduction of infectious diseases.

That the present rate payers were not liable to pay that which ought to have been borne by the rate payers of 1808, and that the act of Parliament provided that one-twentieth of the principal money borrowed was to be repaid every year. That there was no mode of enforcing the security, except by taking possession of the present rates and diverting them from the legitimate purpose for which they were raised.

They also contended that length of time was a bar to the relief.

Mr. *Pemberton*, in reply, referred to the case of *Attorney General v. Bovill* lately before the court(a) in which the charity estates had been purchased with money raised by voluntary contributions amongst the [*579] *parishioners of St. Clement's Danes, yet it had been held that the parish had no right to divert the funds from their original destination.

THE MASTER OF THE ROLLS :—This is an information by the Attorney General praying for relief in respect of an establishment called a charity. In 1742 there was a collection by voluntary subscription, by which means a sum of 450*l.* was raised, and a house was purchased and conveyed to trustees for the purposes stated. I can have no doubt that a charity was thereby established, and that the trustees had no right whatever to sell the property, or to place the produce in the hands of the commissioners to be applied by them to other purposes.

In 1792, it is said that there were no means of applying the premises according to the intention, and that there was then no want of any such institution, as by vaccination cases of small-pox had disappeared. It would be difficult to imagine that such was the case in 1792, or that at any time an hospital for infectious diseases would become useless. It is objected that the establishment is not endowed, and that there are therefore no means of sup-

 1840.—*The Attorney General v. Kell.*

porting it: this is no argument against its being a charitable institution. Here are means of accommodation offered to those persons desirous of availing themselves of them; and if any difficulty occurs as to the application of the fund when recovered, a reference to the Master might be made to approve of a proper scheme.

In 1792, the trustees concur in devoting the house to another purpose, and in 1808 they actually sell the property for 450*l.*, to persons who are not parties to the information, namely, the parish of St. Ann. The *par- [*580] ties seem to have been then desirous of applying the purchase money in aid of the funds for paving, &c., and it ultimately found its way into the hands of the commissioners.

The purchasers conceiving that the title to the property might be impeached, procured an assignment of the rates to certain persons for securing the 450*l.*, and out of this fund they were to be indemnified. This transaction long after took place; it was discovered by the Charity Commissioners, and the Attorney General files this information, whereby abandoning the charity lands, he follows the purchase money in the hands of the commissioners of paving, and he produces in evidence against them the very deed by which they undertake out of the rates to repay the money.

It is said that there are no means of enforcing this demand, because the act of Parliament directs moneys borrowed to be repaid within twenty years.

I think, notwithstanding this, that the Attorney General is entitled to the relief he asks, and that if the hospital is not wanted, and as it is represented, is useless, then a reference must be made to the Master to approve of a scheme for the application of the fund.

The amount of what is due must be ascertained; as to the mode of raising it, if a difficulty should occur, an application to the Queen's Bench may possibly become necessary.

It must be declared that this is a charity trust, and that the 450*l.* and interest, with the Attorney General's costs, ought to be raised out of the rates.(a)[1]

(a) The cause stood over, in order that some proposal might be made by the commissioners as to raising the money.

[1] Vide *Attorney General v. The Ironmongers Company*, ante, 313. *The Same v. Kerr*, ante, 420. *The Same v. The Mayor &c. of Exeter*, 3 Russ 395. *The Same v. Lord Hotham*, id. 415, S. C. Turn. & Russ. 209. *The Same v. The Mayor &c. of Newbury*, 3 Myl. & K. 647. *The Same v. Brettingham*, 3 Beav. 91. *The Same v. The Fishmongers Company*, post, 588.

 1840.—Brown v. Keating.

[*581]

*BROWN v. KEATING.

1840: June 10.

Exceptions to an answer for insufficiency will not fail on account of their not following literally the words of the interrogatory, provided the variation be not important.

THIS bill was filed against several defendants.

The introductory part of the interrogatories of the bill called upon the defendants (naming them) "according to the best *and utmost of their knowledge, remembrance, information, and belief,*" to set forth certain matters, and afterwards proceeded, and "that the said defendants may, in manner aforesaid, answer and set forth, whether *they or one and which of them have not or has not now or had not until a recent or some and what period, in their or some or one and which of their possession, custody, or power, or in the possession, custody, or power of their respective solicitors or solicitor, divers or some and what*" books of account, &c., relating "to the trust property or estate, or to the several other matters and things *hereinbefore* mentioned and set forth, or to some and which of them."

"And *that they may respectively* set forth" a schedule of all such books of account, &c., "distinguishing such as have ever been but are not now in *their* possession, custody, or power, and stating what is become of the same, and of *each* and every of them."

The defendants having filed their answer, the plaintiff took exceptions to one of them for insufficiency, the first of which exceptions was worded as follows:—"For that the said defendant hath not, in and by his said answer, answered and set forth, according to the best of his knowledge, *recollection, information, and belief, whether he the said defendant has not now,* [*582] or had *not, until a recent or some and what period, in his possession, custody, or power, or in the possession, custody, or power of his solicitors or solicitor 'divers' books of account,*" &c. "relating to the trust property or estate in the said complainant's bill of complaint mentioned, or to the several other matters and things *thereinbefore* mentioned and set forth."

The second exception was, "For that the said defendant hath not in manner aforesaid set forth" a schedule of books of account, &c., "distinguishing such as have ever been but are not now in *his* possession, custody, or power, and stating what is become of the same, and of *such* and every of them."

The Master had disallowed these exceptions partly, as was stated, on the ground that the exceptions did not literally follow the words of the interrogatory; and he had reported accordingly.

The plaintiff took exceptions to the Master's finding.

Mr. Pemberton and Mr. E. R. Daniell, appeared in support of the exceptions to the report, insisted that the defendant's answer was insufficient in the points excepted to, and that the Master was wrong in his finding.

1840.—Brown v. Keating.

Mr. Cooper and Mr. Chandless, for the defendant, contended, that the Master was right in the conclusion to which he had come; that it had been decided that exceptions to an answer containing in substance, but not verbatim, the interrogatories not answered, will be overruled; *Hodgson v. But-terfield*.(a) Here the *plaintiff, in his exception, had made several [*583] variations. The words "best and utmost of their knowledge, remembrance," &c., had been converted, in the exception, into "best of his knowledge, recollection," &c., and the words "whether they, or one, and which of them have not, or has not" were changed into "he, the said defendant, has not;" and the interrogatory calling for a schedule of documents in "their" possession, &c., and for a statement of what had "become of the same, and each and every of them," was varied in the exception, and the word "their" converted into "his" and the word "each" into "such."

That the technical rule acted on in the Master's office prohibited any variation between the exception and interrogatory; and that here the variation was material, the meaning of the word "recollection" being different from the word "remembrance." That a contrary practice would lead to constant discussions as to the precise meaning of two words.

THE MASTER OF THE ROLLS said, that on the merits he thought the answer insufficient:—that the subject matter of the exceptions was material:—and that as to the variation which had been complained of between the exceptions and interrogatories, it was quite trifling, and under these circumstances the exceptions to the Master's finding must be allowed. The effect of adopting the strict technical rule, contended for by the defendant, would certainly not be to promote the administration of justice.[1]

Another objection was raised by the defendant to the form of the exception to the Master's report.

*On the 7th of April, 1840, the reference was made to the Master [*584] to report on the sufficiency of the answer.

On the 15th of April, 1840, the Master, under the twelfth general order, 1928, *certified* that three weeks further time was necessary to make his report.

On the 30th of April, 1840, he made his report, and the exceptions were entitled exceptions to the report made in pursuance of an order bearing date the 7th day of April, 1840, but they did not set out the date of the report itself.

For the defendant, it was objected that this was informal, as the Master had

(a) Sim. & Stu. 236.

[1] "My opinion is, that the plaintiff is not bound to set out in his exception, every word of the passage, which he alleges is not answered; but that he does enough if he sufficiently manifests what part of the bill his exception applies to." Shadwell, V. C.; *Woodroffe v. Daniel*, 10 Sim. 243. And see *ibid.* 244, n. 1. *Buloid v. Miller*, 4 Paige, 474. *German v. Machin*, 6 Paige, 288, 294. *Brooks v. Byam*, 1 Story's Rep. 297, 300.

 1840 —Cane v. Martin.

made two reports pursuant to the order of the 7th of April, viz : that of the 15th and that of the 30th.

The court, however, disallowed the objection.

CANE v. MARTIN.

1840 : June 16.

After demurrer allowed, the plaintiff's solicitor refused to proceed until payment of his bill : Held, that he was bound to deliver over the papers to the new solicitor of the plaintiff on the usual undertaking, as to lien and redelivery, but that the party ought, under the circumstance, to undertake to prosecute the suit with due diligence.

Mr. E. had been employed as the solicitor of the plaintiff, and a demurrer, filed by the defendants, to the bill had been allowed on merits. It was stated that the plaintiff had been advised by his counsel not to prosecute the suit further. Mr. E. declined to act further for the plaintiff until payment of his bill of costs ; Mr. B. had subsequently consented to act in the suit for the plaintiff.

[*585] *The plaintiff presented this petition, praying that Mr. E. might deliver up the papers in the cause to the new solicitor, without prejudice to any lien for costs, Mr. B. undertaking to return them after the hearing.

Mr. E. did not object to any inspection of the papers.

Mr. *Renshaw* for the petition cited *Heslop v. Metcalfe*,^(a) as a direct authority for the application, and *Colegrave v. Manley*.^(b)

Mr. *Elderton* argued, that *Heslop v. Metcalfe* was not consistent with the former authorities. That here the suit was such as rendered it impossible that it could be successfully prosecuted ; that the undertaking to return the papers after the hearing would be ineffectual, as the hearing would probably be indefinitely postponed ; and thus the solicitor would be wholly deprived of the papers and of his lien on them, That Mr. B. should therefore undertake to prosecute the suit with due diligence.

Mr. *Renshaw* in reply.

THE MASTER OF THE ROLLS :—In all cases of this description there are two questions of inconvenience ; first, on the solicitor who has prosecuted the suit at a great expense, if the papers are taken from him before his bill is satisfied ; and secondly, on the client whose course to the attainment of justice is obstructed by the retainer of his papers. The Lord Chancellor, after consideration, has decided the proper course to be to deliver over the papers without prejudice and on a certain undertaking. I cannot, therefore, [*586] now *consider whether the case of *Heslop v. Metcalfe* was founded on previous authorities ; but it is an authority so far for the present

(a) 3 Myl. & Cr. 183. [S. C. 8 Sim. 622.]

(b) 1 Turn. & R. 400.

1840.—Welford v. Stainthorpe.

application. This is not exactly like the other case: here the party has been advised by competent persons that the cause ought not to be prosecuted; on the other hand, the plaintiff, perhaps, has been advised by equally competent persons that it may be advantageously prosecuted. I think, under these circumstances, the plaintiff ought not to take the papers out of the hands of Mr. E. without an undertaking to prosecute the suit with due diligence. As the solicitor does not refuse the parties access to the papers, let the petition stand over until the next day of petitions, the solicitor giving free access to the papers in the mean while, in order that the parties may determine whether they will give the undertaking.[1]

EXTRACT FROM ORDER.—F. B. (the new solicitor) “undertaking to prosecute this cause with all due diligence,” and that the documents, &c., delivered to him under this order shall be received without prejudice to any right of lien, and “that they shall be returned undefaced within ten days after the hearing of this cause, or after he shall at any time cease or decline diligently to prosecute the suit.” His Lordship doth order the delivery over of the papers, &c., in or connected with this cause to F. B.

*WELFORD v. STAINTHORPE.

[*587]

1840: June 24.

A defendant, who in his answer refers to a deed in the words, “as by the said indenture, when produced will appear,” must produce it for the inspection, &c., of the plaintiff, although he does not “crave leave to refer to it.”

THIS was a motion for the production of documents in the defendant's possession.

The defendant by his answer referred to an indenture in these words, “as by the said indenture, when produced, will appear.” This reference differed

[1] Vide 3 Myl. & Cr. 190, n. 1. *Boxon v. Bolland*, 4 Myl. & Cr. 354. *Mills v. Finlay*, 1 Beav. 560. *In re Smith*, 4 Beav. 309. *Steele v. Scott*, 2 Hog. 141. *Bennett v. Baxter*, 10 Sim. 417. An attorney is not bound to proceed in a suit, unless the client pays his costs, nor will the court compel him to proceed, without his costs are paid or secured. *Castro v. Bennett*, 2 Johns. Rep. 296. This position of the Supreme Court of the State of New York is plain and intelligible. If the attorney cannot be compelled to go on, unless secured for his previous services, why should he be compelled, in the least degree, to relax the lien which he may have for those services? Is it not evident that by allowing the client the temporary possession of papers on which the attorney has a lien—for the purpose of availing himself of them as proof in the cause—that by that very means he may carry out his suit to a successful result, and then return to his attorney a paper which would be utterly worthless. When the client has, through the instrumentality of another attorney, recovered a judgment on a bond, or promissory note, which is then returned to the former attorney, it may well be questioned if the restored bond or note would be of much value to the former attorney, as a lien. If he could extend his lien to the judgment, it would be merely, to use a phrase of Lord Brougham, “to treat him with a bill in Chancery.” A different consideration may apply to papers and documents, which, as being in the nature of public records, or in the possession of third persons, copies might be procured, but at expense and inconvenience: and it is perhaps to papers of this description that the language of Lord Cottenham, in *Heslop v. Metcalfe*, is to be confined.

1839.—The Attorney General v. The Fishmongers Company.

from that in *Hardman v. Ellames*,^(a) as it omitted the words "to which for greater certainty the defendant craves leave to refer."

Mr. Keene, for the motion cited *Hardman v. Ellames*.

Mr. Pemberton, contra, said he could not resist the production, after the decision in the case referred to.

THE MASTER OF THE ROLLS, therefore, ordered the production of the deed.[1]

[*588] "THE ATTORNEY GENERAL v. THE FISHMONGERS COMPANY.
(PRESTON'S WILL.)

1839 : January 26, 28, 29 ; February 6 ; November 9.

A testator in whom real-estates were vested, subject to certain rent charges, devised them to the Fishmongers Company, "in aid of the maintenance of the poor men and women of the mystery and community aforesaid for ever;" being precisely the same terms as those under which, by their charter, the company were licensed to hold land in mortmain: Held, under the circumstances, that the testator was a mere trustee for the company; and an information being filed by the company, to carry into execution the charitable trusts mentioned in the testator's will, was dismissed with costs.

A chartered company became entitled by a devise to them in the terms of their charter contained in the will of one of their body to property subject to rent charges, which were devoted to superstitious uses principally under the will of Sir J. C. In 1437, Sir J. C.'s executors of their good grace, zeal and love which they had unto the soul of Sir J. C., and to the intent that his will might be better observed, paid to the company 400 marks in recompense of the great charge and cost the company had borne in reparations of the land out of which the rent charge was issuing, so that the will of Sir J. C. might be observed and kept in time coming. In 1547 the statute against superstitious uses passed, and three years after the company purchased the rent charges of the crown, which were conveyed by letters patent; subsequently in the 4th Jac. 1, an act of parliament passed, whereby, to remove doubts and questions, it was enacted that all messuages, rents, &c., as had been theretofore devised to the company, and which were mentioned in the letters patent, might be thereafter held by the company against the king, saving the rights of persons other than the king. The company had ever since been in possession of the property, and had dealt with it as their general property, but had applied part of the rents in charity. In an information filed in 1832, insisting that the property was devoted to charity under the devise: Held that at this distance of time any thing which seemed ambiguous ought to be presumed in favor of the company.—That the testator was a mere trustee for the company—that it ought to be presumed, that charges to which the crown became entitled, and which were granted to the company, were equal to, if they did not exceed, the whole value of the land, and that under the grant and statute the estates themselves became the property of the company.

THIS information was filed in September, 1832, against the Fishmongers Company in respect of certain property, situate in Lombard Street, Grace-

(a) 2 Mylne & K. 732.

[1] When a defendant, admitting in his answer, that documents are in his possession, will be required to produce them for the plaintiff's inspection. See 3 Myl. & Cr. 546, n. 1. 2 Sim. & Sta. 311, n. 1. *Burrell v. Nicholson*, 1 Myl. & K. 680. *Adams v. Fisher*, 3 Myl. & Cr. 526. *Murray v. Walter*, Cr. & Ph. 114. *Addis v. Campbell*, 1 Beav. 258. *The Attorney General v. Strutt*, 3 Beav. 396. *Hercy v. Ferrers*, 4 Beav. 97. *Balls v. Margrave*, id. 119. *Bannatyne v. Leader*, 10 Sim. 230. *Combe v. The Mayor &c. of London*, 1 Yo. & Coll. C. C. 631. *Smith v. Duke of Beaufort*, 1 Hare, 507.

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church Street, and Thames Street, which had been devised to them by Henry Preston, and its object was to have the revenue devoted exclusively to the alleged charitable trusts mentioned in his will.

Henry Preston, a citizen and fishmonger of London, made his will, dated the 20th of February, 1435, and after *reciting that he, John [589] Mitchell and nine other fishmongers therein named, together with Elizabeth Wylford, widow, had lately purchased to them and their heirs and assigns for ever, certain messuages, &c., in Grace-church Street and Lombard Street, and the great tenement in Thames Street, (the property in question in this cause,) and that they had afterwards by deed, dated the 22d of November, in the 15th Hen. 6, demised, enfeoffed, &c., unto John Hamwell, John Watkyns and John Gift, the property in Thames Street, for the life of Sir John Cornwall, Knight, Lord de Fanhope, and that afterwards John Mitchell and the other nine fishmongers and Elizabeth Wylford, by deed dated the 15th of December following, did release to him the testator, his heirs and assigns, all their right, &c., in the above tenements, &c., and that he the testator was then sole seised in fee simple, the testator "gave and bequeathed to Thomas Badly and five other persons, then wardens of the mystery of fishmongers, and to the commonalty of the same mystery, and their successors for ever, all the above said tenements, &c.," subject to the estate for the life of Sir John Cornwall, to hold the same "in aid of the support of the poor men and women of the mystery and commonalty aforesaid for ever:" (*"in auxilium sustentationis pauperum hominum et mulierum misterie et communitatis prædictarum in perpetuum."*)

The testator's will was proved in November, 1438, and shortly afterwards the estate came into the possession of the Fishmongers' Company, who carried the revenues to their common fund, which they applied partly towards charitable purposes, but to no specific purposes in particular.

The relator, relying on the will of Preston alone, insisted that the devise to the company in aid of the *support of the poor men and women of the company for ever,—(*in auxilium sustentationis pauperum hominum et mulierum misterie et communitatis prædictarum in perpetuum,*)—was a charitable devise, and by this information sought to have the income of the property devoted to the charitable purposes pointed out by will of the testator Henry Preston.

From the evidence of the defendants, it appeared that in 1432, the Thames street property was vested in Sir John Cornwall, subject however to a rent charge of 20 marks, devoted by John de Heylesdon to superstitious uses, and the Grace-church street and Lombard street property was then vested in Londerpope, Fitz Geoffrey, and Pijou.

On the 8th of February, 1433, the Fishmongers' Company obtained a new charter, containing a license to hold lands in mortmain to the value of 20*l.* a year, "*in auxilium sustentationis pauperum hominum et mulierum misterie*

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et communitatis prædictarum in perpetuum," being the very same words as those used in the devise in the testator's will.

On the 11th of November, 1434, Sir John Cornwall conveyed the Thames street property to Londroppe, Fitz Geoffrey, and Pijou, who, on the 18th of November following, granted him an annual rent of 40 marks, payable out of both properties, and on the same day they released the whole property, together with other property which had formerly belonged to Thomas Wylford, to John Mitchell, *Henry Preston*, and eight other fishmongers, and to Elizabeth, the widow of Thomas Wylford, who, on the next day, granted an annual rent of 40*l.* to Sir John Cornwall, which was not to be levied [*591] during the life of Elizabeth Wylford, or so *long as the 40 marks above mentioned should be regularly paid.

On the 18th of November following, John Mitchell and the eleven other persons demised the Thames street property to H., W., and G., for the life of Sir John Cornwall; and on the 15th of December, 1434, the whole property was released to Preston in fee, who in February, 1435, made his will to the effect already stated.

Sir John Cornwall devised the 40 marks to superstitious uses, including prayers for his soul, and the souls of other persons therein mentioned; and he directed his executors to dispose of the residue of his effects for the safety of his soul, as to them might seem best.

After the death of Sir John Cornwall, and on the 20th of April, 1446, his executors of their good grace, zeal and love that they had unto the soul of Sir John Cornwall, and to the intent that his will might in all things be the better observed and kept forever, paid to the wardens of the company 400 marks sterling in recompense of the great charge and cost the company had borne in the helping of the reparations of the lands whereout the rent charge of 40 marks was issuing, so that the will of Sir John Cornwall might be observed and kept in time coming.

The statute of the 1 Ed. 6, c. 14, afterwards passed, whereby lands and the issues of lands devised to superstitious uses were forfeited to the king, (see ante, p. 154.)

An arrangement afterwards took place between the Crown and the several companies for the purchase of the rent charges to which the Crown [*592] had, or was *supposed to have, become entitled; and by letters patent, dated the 14th of July, 4 Ed. 6, in consideration of the sum therein mentioned,(a) the King granted to Augustine Hinde and two others, various rents, annuities and yearly sums issuing out of the lands belonging to several companies of the city of London, and amongst others the fishmongers, and amongst the rents issuing out of the lands of the Fishmongers Company were the 13*l.* 6*s.* 8*d.* and 26*l.* 13*s.* 4*d.*, payable out of the property in ques-

(a) See ante, p. 156.

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tion, and devoted to superstitious uses under the wills of John de Heylesdon and Sir John Cornwall.

The statute 4 Jac. 1, c. 10, afterwards passed, confirming to the companies all such messuages, &c., as had been theretofore devised to any of the said companies, and which lands, &c., were mentioned or named in the letters patent of the 4 Ed. 6.(a)

The information was filed in September, 1832; and it appeared from the defendant's answer, that the defendants had from time to time carried the rents of the property to their general funds, out of which they had applied considerable sums in support of the poor men and women of the company; but they said they had done this of their own free will and mere motion. They had also, for a long series of years, been accustomed to use the Thames street property as their hall; and had received 20,000*l.* for part of this property, and for damages under the London Bridge act, (1827,) which they had applied in rebuilding their hall, to some extent, on the remaining Thames street property.

The cause now came on for hearing.

*Mr. Temple, Mr. C. P. Cooper and Mr. O. Anderdon, in support [*593] of the information, contended that as it appeared by the documents, and was even admitted by the defendants, that the property had been conveyed to Preston in fee, it must be taken that he was beneficially entitled. That there was a distinct trust created by his will for the benefit of "the poor men and women of the company for ever." That such a charitable trust was good, the persons to take being sufficiently certain; *Attorney General v. Clarke*,(b) where a bequest to the poor inhabitants of St. Leonard's Shoreditch, was held good. That this court, therefore, would compel the defendants to perform the trust.

That, even if Preston was only a trustee for the company, as was contended by the defendants, still his will had defined the trusts on which the company were to hold the property, and which they could not now repudiate.

Mr. Pemberton and Mr. J. Romilly, contra, contended, first, that Preston was a mere trustee for the Fishmongers Company, who were the parties beneficially entitled to the property, and that the court had no jurisdiction over the general funds of a corporation: *Attorney General v. The Corporation of Carmarthen*,(c) *The Mayor of Colchester v. Lowten*.(d)

That having regard to the state of the law at the remote period of time at which the transaction took place, the whole though apparently involved, could be satisfactorily explained. It was the universal practice prior to the statute of uses, for a purchaser of lands to have them conveyed, not [*594] to himself directly, but to *himself and a number of feoffees, to hold really to his use, though none was declared: the practice is distinctly

(a) See ante, p. 157.

(b) Ambler, 422.

(c) G. Cooper, 30:

(d) 1 Ves. & B. 226; and see 2 Myl. & C. 613, and the cases therein referred to.

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stated by Justice Manwood in *Brent's Case*,^(a) in the recital to 1 Ric. 3, c. 1. By the custom of London a citizen of London could devise lands in London in mortmain, though he could not alien in mortmain;^(b) and though a stranger could devise lands in London, he could not devise them in mortmain.^(c) In those times persons desirous of establishing permanent superstitious uses, such as *obits*, &c., were anxious to vest the lands for that purpose in corporations having permanent continuance. Now Sir John Cornwall, being, by himself or his trustees, entitled to the property in question, and being desirous of establishing a perpetual rent charge to be applied for prayers for his soul, &c., entered into an arrangement for securing the rent charge with the Fishmongers Company, who were on their part anxious to obtain the land; but the charter of incorporation and the then existing law compelled them to have recourse to this circuitous mode. They could purchase lands to no greater extent than 20*l.* a year, but they might obtain by devise land in London to any amount. The property was therefore conveyed to a number of feoffees, the rent charge was secured, as was also a life estate, to Sir John Cornwall: the estate was then conveyed to Preston, a citizen and fishmonger, and by him was devised to the company in the very words of the charter. The arrangement was further evidenced by the deed of the 20th of April, 1446, by which the executors of Sir John Cornwall voluntarily paid 400 marks to the company to enable them the better to perform his will.

[*595] **Secondly*, they argued that if the property really belonged to Preston, yet being devised to the company for the same purposes as they held their corporate property, the court could not deal with it as with a charitable trust.

And *thirdly*, that the 40 marks and 60 marks which were payable out of the property and had been devoted to superstitious uses, were the full value of the property: that it became forfeited to the Crown under the statute of Ed. 6, and that, under the letters patent of Elizabeth and the statute of James 1, the whole property became vested beneficially in the company, discharged of every trust and incumbrance, in a manner analogous to that in *Sir Thomas Kneseworth's Case*.^(a)

Mr. *Temple*, in reply, contended that if the matter stood on the charter alone by which the company were empowered to hold lands for the poor of their company, there was no authority to warrant the proposition that they were exempted from the ordinary jurisdiction of this court; that if they applied the fund for purposes foreign to those for which alone they were empowered to hold land in mortmain, this court had authority to compell them to make a due application of the funds. That the cases cited of *The Attorney General v. The Corporation of Carmarthen* and *The Mayor of Colchester v. Lowten* decided this only, that a corporation having property un-

(a) 2 Leonard, 15.

(b) 2 Bro. Abr. 70. pl. 13; 1 Bro. Abr. 206. pl. 7.

(c) 1 Bro. Ab. 207. pl. 36 and 41.

(d) See ante, p. 166.

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affected by any trust, could, like individuals having an absolute estate, deal with it as they pleased. But that, whatever might be the law as to property under the charter, still it was clear that this property, which had always been admitted to be held under the will, and the rents of which had ever since *been partially at least applied towards the objects pointed out [*596] by the will, was subject to the ordinary jurisdiction of this court.

That no necessity was shown for having recourse to the intricate mode suggested of obtaining the property, and if there had been still it would be an illegal act,—a fraudulent evasion of the law which this court could not support: *The Bank of England v. Booth*.(a)

That the rent charges which had been devoted to superstitious uses were quite distinct from the *corpus* of the estate, and that the former alone became forfeited; and that, even if the rent charges exceeded the value of the estate, still, when the value increased, the charity was entitled to the surplus.

November 9.—THE MASTER OF THE ROLLS:—This information prays for a declaration, that the defendants were seised and possessed of certain property which was devised to the Fishmongers Company by the will of Henry Preston, in trust for the uses expressed in the said will, and not for their own use, subject only to the payment of two yearly sums of 26*l.* 13*s.* 4*d.* and 13*l.* 6*s.* 8*d.* chargeable thereon; that the great hall of the company, or a part thereof, constitutes part of the charity property; that an account might be taken of the rents of such part of the property as have been let, and that the defendants may be charged therewith, and with an occupation rent for the use of the hall for twenty years before the information was filed; and that a scheme may be settled for *the future application of the rents of the [*597] charity property, having regard to the testator's will in that behalf.

The will under which this relief is sought, is dated the 20th of February, 1435, nearly 400 years before the information was filed; and more than 400 years have now elapsed since the death of the testator, to whom the property is alleged to have belonged.

The estate came into the possession of the company within a few years after the death of the testator, and during the whole time which has since elapsed the property has been used and dealt with as part of the general property of the company, and has been applied to the general purposes thereof. Those general purposes have been in part charitable, but no special destination has been given to the revenue arising from this property, as distinguished from the other general property to which the company is entitled.

The property was, however, by the will of Preston devised to the wardens and commonalty of the company, to be held by them in aid of the support of the poor men and women of the company for ever,—(*in auxilium sustentationis pauperum hominum et mulierum misteria et communitatis*

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prædictarum in perpetuum ; and this the relator insists as a charitable purpose to be executed by this court, which ought to interfere notwithstanding the lapse of time.

The defendants contended that they have shown an absolute title in themselves, and it is necessary to advert to the circumstances under which the estate was proved to have been acquired.

[*598] *The property consists partly of property situated in Grace-church Street and Lombard Street, and partly of property which has been described as the great tenement in Thames Street.

First, the Grace-church Street and Lombard Street property in the time of Richard II. belonged to John de Heylesdon, who charged it with a rent charge of 20 marks, or 13*l.* 6*s.* 8*d.* for *superstitious uses* ; and subject to that charge the property afterwards became vested in John Coventry, whose executors, having power to sell under his will, sold it to John Radwell, William Londroppe, John Fitz Geoffrey and Walter Pijou, to whom it was conveyed on the 27th of May in the eighth year of King Henry VI., viz. the 27th of May, 1430. Upon the death of Radwell this property became vested in Londroppe, Fitz Geoffrey and Pijou, the three survivors.

Secondly, The great tenement in Thames Street in the year 1368, belonged to John Lockyer : in 1413 it had become the property of William Askham, whose acting executor, Thomas Botiller, sold it to Sir Thomas Sackville and five other persons, and in the year 1432, and by deeds executed then or in the course of year or two next following, it was conveyed to Sir John Cornwall, Lord of Fanhope.

It thus appears, that in the year 1432 a part of the property now in question belonged to Sir John Cornwall, and that the remainder was vested in Londroppe, Fitz Geoffrey and Pijou. From the circumstances which afterwards took place, it is at least probable that Londroppe, Fitz Geoffrey and Pijou were trustees for Sir John Cornwall.

[*599] *About the same time the fishmongers obtained a new charter, which was dated the 8th of February, 11 Henry VI., viz : 8th of February, 1433. This charter contains a license to hold lands in mortmain to a limited amount, and it is remarkable that the license was to hold the land to the wardens and commonalty, and their successors for ever, in aid of the maintenance of the poor men and women of the mystery and community aforesaid for ever,—(*in auxilium sustentationis pauperum hominum et mulierum misteræ et communitatis prædictarum in perpetuum* ;) being the same words which are employed by Preston in his will in relation to the property thereby purported to be given to the company.

On the 11th of November, 1434, Sir John Cornwall conveyed the great tenement to Londroppe, Fitz Geoffrey, and Pijou, the three survivors of the four persons to whom the property in Grace-church street and Lombard street had been conveyed four or five years before ; and on the 18th of November

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1434, Londroppe, Fitz Geoffrey and Pijou granted to Sir John Cornwall an annual rent of 40 marks (26*l.* 13*s.* 4*d.*) issuing out of both properties : an additional rent of 5 marks was payable if the rent of 40 marks was in arrear or unpaid for three months, and there was a power to enter and distrain.

On the same 18th November, 1434, Fitz Geoffrey and Pijou executed a deed, whereby, after reciting a lease which they had granted for 40 years to the releasees after named, at the rent of a red rose, they released both properties, together with other property which had formerly belonged to Thomas Wylford, to John Michel, described as citizen and alderman, to Richard Bokeland, Thomas Dufhous, John Whatton, Thomas Blackenhall, *Henry Preston*, Thomas Botiller, John Tasburg, *Thomas Lincoln, Richard [*600] Banaster and Thomas Badley, described as citizens and fishmongers, and to Elizabeth, the widow of Thomas Wylford.

On the next following day, viz: the 19th of November, 1434, these twelve persons, in whom the legal estate, not only of the property now in question, but also of the property formerly Wylford's, was vested, granted a rent of 40*l.* per annum to Sir John Cornwall, payable out of all the property so vested in them, with powers of entry and distress ; but there was a proviso that no levy should be made during the life of Elizabeth Wylford ; and a further proviso, that if Londroppe, Fitz Geoffrey and Pijou should pay to Sir John Cornwall the rent charge of 40 marks, according to the former deed, the annual rent of 40*l.* and the payment thereof should not be in any manner leviable, but should be suspended, and should only be required when the rent of 40 marks were in arrear and unpaid. A confirmation of this deed was executed two days afterwards, and by means of it it would seem that Sir John Cornwall obtained an additional security for the payment of the rent charge of 40 marks granted to him on the preceding 18th of November.

The whole property being now vested in John Michel and the eleven other persons named in the release of the 18th of November, subject to the payment of the rent of 40 marks granted by the deed of even date, and to the payment, out of Heylesdon property, of the rent charge of 20 marks created by Heylesdon, and Sir John Cornwall having obtained an additional security for his rent charge of 40 marks, it appears by a recital in a subsequent deed, and also by a recital in Preston's will, that on the 22d of November, 1434, John Michel and the eleven other persons demised, enfeoffed and confirmed the great tenement to Hamwell, Watkins and *Gift, and their [*601] assigns for the whole life of Sir John Cornwall, Lord of Fanhope ; and on the following 15th of December, 1434, John Michel and his co-releasees in the deed of the 18th of November, except Preston, without any consideration expressed, released their right and claim to the estates to Henry Preston, his heirs and assigns for ever.

On a consideration of the facts stated, and having regard to the state of the law at the time, it appears to me that the property in question was acquired by the company under an arrangement between them and Sir John

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Cornwall, Lord of Fanhope, that Henry Preston became and was a trustee for the company, and that the company acquired the property with an intention to hold it, subject to the charges, under the license contained in their charter.

On the 1st of April, 1437, Sir John Cornwall, Lord of Fanhope, made a will, whereby he devised the rent charge of 40 marks to the prior and convent preachers near Ludgate, for superstitious uses. He made a subsequent will, dated the 10th of December, 1443, which did not alter that disposition, and disposed of other property.

The sum of 400 marks being voluntarily paid by the executors of Sir John Cornwall to the company, in recompense of the costs and charges they had incurred and in order to secure the performance of the will of Sir John Cornwall with respect to his intended application of the rent charge of 40 marks, it seems necessarily to follow, that in the opinion of the executors the performance of the will would have failed without this assistance, and consequently, that the property was not considered sufficient. But we [*602] may presume that the "company, having received the assistance, undertook to pay the rent charges, and continued to pay them for the intended purposes till the time of the Reformation, for we find the yearly sum of 29*l.* 13*s.* 4*d.* issuing out of the whole of this property, and the yearly sum of 13*l.* 6*s.* 8*d.* issuing out of the part situate in Lombard Street and Gracechurch Street comprised in the letters patent or grant made for valuable consideration by King Edward VI. to the company in the fourth year of his reign. In the mean time the property was treated as absolutely belonging to the company.

On this case the relator contends, first, that this was the property of Preston, and is subject to the trusts of his will under which the defendants claim title; but probably foreseeing that under the circumstances it might appear that Preston was not entitled beneficially, or otherwise than as trustee for the company, he further contends, that supposing Preston to have been only a trustee and to have made his will according to the directions of the company, still the will expresses the terms on which the company took and professed to hold the property; and those terms describe a trust from which the company cannot be relieved. To this it is answered for the defendants, first, that the terms of Preston's will exactly correspond with the terms of the charter, and cannot show a charitable trust any more than the charter shows that any other property held under the same license is held on a charitable trust to be executed in this court; that property given by will, even if given by a stranger, (which they insist, and I think with reason, Preston was not,) for the very same purposes for which they were licensed to hold land in mortmain, could be held only on the same trusts and in the same manner as all other lands held under the same license; and it being, as alleged, [*603] clear that this court "has no jurisdiction over other lands held under that license, it is argued that the court has no jurisdiction over these

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lands. It is contended further, that even if these lands or the surplus rents after satisfying the charges were subject to a charitable use which might be executed in this court, yet they were charged with annual sums, exceeding the annual value of the property, for superstitious uses; that those annual sums became the property of the Crown, and were by the Crown granted to the company; and that afterwards, by the act of 4 J. 1, c. 10, the lands out of which the rents were issuing were secured to the company, and that thereby the property became theirs, and I am of that opinion.

We are now at the distance of 400 years from the time when the transaction took place, and it is very difficult, if not impossible, satisfactorily to explain every particular of the whole transaction; but I am of opinion that after so long an uninterrupted usage any thing which seems ambiguous ought to be presumed in favor of the company's title. I think that Preston was only a trustee for the company; and although the words of the charter and of Preston's will which, in my view, must be taken as made with the concurrence of the company, import a trust such as might be executed by this court, yet the trust could only attach upon the surplus which remained after satisfying the specific charges: and in this case, with such reason to think that at the time when the transaction took place the value of the property did not equal the charge, without any evidence that the value had increased before the grant of King Edward VI., and with an uninterrupted use of the property, as belonging to the company, for a period of nearly 400 years, it appears to me, that I ought to presume that the charges to which the Crown became entitled, and which were granted to the company, were *equal [*604] to, if they did not exceed, the whole value of the land; and under these circumstances, I am of opinion, that by the grant and the subsequent statute of James I., the estate became the property of the company, and therefore that this information must be dismissed with costs.

Affirmed by the L. C., 13th January, 1841.[1]

[1] The case on appeal is reported, 5 Myl. & Cr. 16. If there be no doubt of the origin and existence of a trust, this court will not allow lapse of time to enable those, who are mere trustees, to appropriate to themselves that which is the property of others; but in questions of doubt whether any trust exists, and whether those in possession are not entitled to the property for their own benefit, the court will pay the utmost regard to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust. *Ibid.*

AN

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On a reference to the Master of exceptions for impertinence, he enlarged the time for making his report three times, and on the 19th of February reported the answer insufficient; on the 4th of March the defendant gave notice of motion to take the certificates off the file, on the ground of irregularity and of the Master's having power to enlarge the time only once: the court held that, even assuming the Master's power to have been so limited, the defendant came too late, he not having previously taken the objection. *Davis v. Franklin*, 369

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A joint and several answer filed for two persons, by a solicitor having authority from one only, will not be ordered to be taken of the file on the application of one party in the absence of the other. *Wiggins v. Peppin*, 403
See EXCEPTIONS. INJUNCTION, 3. PRODUCTION OF DOCUMENTS, 2.

APPEARANCE.

The defendant having made default in entering his appearance, and the service of the subpoena and order having been properly authenticated, the Court, under the 4 & 5 W. 4, c. 82, ordered an appearance to be entered by the six clerk. *Dodd v. Webber*, 502
See COSTS, 1.

APPOINTMENT.

See POWER, EXECUTION OF. TRUST, 1.

ARBITRATION.

Several actions and suits being pending between the plaintiff and defendant, one of such actions came on for trial in the Queen's Bench, when, by consent, all matters in difference, including the suits at law and in equity then depending between the parties, were referred to arbitration. The plaintiff in equity afterwards served a subpoena to hear judgment and set down the causes. The court on motion, set aside the

subpoena with costs, and struck out the causes from the list. *Ambler v. Tebbutt*, 442

ASSIGNEE.

See INSOLVENT, 1. OFFICIAL ASSIGNEE.

ASSIGNMENT.

Assignment of all and every the household goods, &c., the particulars whereof were stated to be more fully set forth in an inventory signed by the grantor, and annexed thereto. There was no such inventory: Held, nevertheless, that the assignment was effectual; it appearing from the answer of the party resisting its validity, that the particulars could be ascertained. *England v. Downe*, 522

ATTORNEY GENERAL.

In an information by the Attorney General at the instance of a relator the Attorney General ought not to appear otherwise than in support of the information.

As to the position of the Attorney General in informations at the instance of a relator, and the practice in such cases. *Attorney General v. The Ironmongers Company*, 313

AUCTION.

See TURNPIKE ACT.

B

BANKRUPT.

Injunction granted to restrain a party from taking proceedings under the 1 & 2 Vict. c. 110, s. 6, by means whereof an act of bankruptcy might be deemed to have been committed by, or a *fiat* of bankruptcy issue against the plaintiff.

Partners being indebted to their bankers, it was agreed between them that one should retire, that the assets should be transferred to the continuing partners who were to take upon themselves the partnership liabilities, and that the bankers should release the retiring partner from his liability. The bankers signed a memorandum acceding to the agreement, and having afterwards attempted, by means of the debt, to make the retiring partner a bankrupt, they were restrained from so doing by an injunction. *Attwood v. Banks*, 192

See OFFICIAL ASSIGNEE.

BARON AND FEME.

See HUSBAND AND WIFE. SEPARATE ESTATE. SEPARATE USE.

BEQUEST.

1. Bequest to trustees to be divided between the testator's wife and six poor members of a chapel, share and share alike: Held, that the wife was entitled to one-seventh absolutely, and that the other six-sevenths formed a permanent charitable fund, the interest alone of which was from time to time payable to the poor. *Gregory v. The Attorney General*, 366

2. Bequest of a pecuniary legacy to A. for life, with remainder to B. for life, with remainder to the children of A. living at the decease of the survivor of A. and B., to be paid at twenty-one with benefit of survivorship in case of the death of any such children under twenty-one, with a gift over to X. if all such children died under twenty-one. A. had two children only, who attained twenty-one and died in A.'s lifetime, leaving children: Held, that the gift over to X. took effect. *Wilson v. Mount*, 397
3. A testator gave some pecuniary legacies to infants, to be paid to them on their attaining twenty-one; and by a codicil he directed, that as far as it might be practicable, all his legacies should be paid within six months after his decease: Held, that the direction in the codicil did not accelerate the time of payment to the infant legatees. *Frost v. Capel*, 184
4. Bequest in trust for all the children of the testator's late uncle J. B. deceased, to be divided equally amongst them and the issue of such of them as should be deceased, share and share alike, such issue to be entitled to the share of his deceased parents equally amongst them: Held, that the grandchild of J. B., whose parent was dead at the date of the will, was entitled to take. *Bebb v. Beckwith*, 308
5. A testator by his will gave the residue of his estate to his wife. By a codicil, "instead of giving the whole of his property, after the legacies were paid, to his wife," he bequeathed 10,000*l.*, the interest of which to be paid her for life, "and then to go to his daughter, and his house and furniture, plate, wines, &c., at K. R., in short, the whole of his property at his decease, except carriage and horses and his gold repeater; and it was his further wish that she might continue in either house, but not to change, and having the use of the same during her life, wines, spirits, &c., included: Held, that the gift by the codicil beyond the 10,000*l.* was void for uncertainty. *Baker v. Newton*. *Newton v. Richards*, 112
6. A testator bequeathed a moiety of personal estate to his daughter for life, with remainder to her children, with remainder to the children of such children as should die in the life of the daughter; he gave the other moiety to his son for life, with remainder to his children; but if his son died without issue him surviving, he gave the last mentioned moiety to the children of the daughter, "in such shares and proportions and in such manner as was thereinbefore directed and appointed for the payment and division of their shares in the other moiety;" the son died without issue: Held, that the daughter took a life interest in the second moiety by implication. *Davies v. Hopkins*, 276
7. A gift in terms importing a present vested interest with a postponed time of payment is not made contingent by a direction to accumulate till the time of payment arrives. *Blease v. Burgh*, 226
8. A testatrix bequeathed several legacies, and amongst others, one to a servant, "if he should be residing with her at the time of her decease, but not otherwise;" and she directed the said legacies to be paid "within six months after

her decease," and declared that the legacies should not be vested until payable. The legatee died before the expiration of six months: Held, that the representatives of the legatee were entitled to the legacy. *Lucas v. Carline*, 367

9. Request of 600*l.* to be applied towards payment of the debt to which Z. Chapel was or might be subject at the testator's decease. The chapel was vested in trustees for a particular class of dissenters. The general body of that class had incurred a debt for building chapels, and 600*l.* were laid on Z. Chapel, which it was expected would be raised by voluntary subscription of the members, but there was no legal liability: Held, that the legacy failed. *Davies v. Hopkins*, 276
 10. A testator gave his residuary estate to his wife for life, and to be divided amongst and paid to his children on the whole of them attaining twenty-one, and not before; but the payment to be postponed till the death of their mother; and he directed maintenance to be allowed them in event of the wife's death while the children were under twenty-one; there was a gift over to the children of any child who should die before receiving his share, and the testator provided that in case any of his children should die without leaving issue, his share should go over to the survivors. A child attained twenty-one after the widow's decease, but died without issue before receiving her share: Held, that her representatives, and not the surviving children, were entitled to her share. *Whiting v. Force*, 571
- See CHARITY, 6, 7. CUMULATIVE LEGACY, *passim*. DEVISE. ESTATE FOR LIFE. MORTMAIN. PERISHABLE PROPERTY, 1, 2, 3. REMOTENESS, *passim*. SPECIFIC LEGACY, *passim*. SUPERSTITIOUS USES. TRUST, 1.

BILL OF EXCHANGE.

See INTERNATIONAL LAW.

BOND.

See BREACH OF TRUST, 2.

BREACH OF TRUST.

1. Two executors were directed, after making some annual payments, to invest and accumulate the surplus. One of the executors received the dividends of stock for several years, and misapplied them; it did not appear that the other executor had any knowledge thereof: Held, that the latter was not answerable for the breach of trust.
Two executors sold out stock, and the produce was received by one: Held, that the other was responsible for its misapplication, but was entitled to an inquiry, whether any part had been applied in discharge of claims against the testator. *Williams v. Nixon*, 472
2. An obligor of a bond, after notice that it had been assigned on trusts, of the particulars of which there was no proof of his being cognizant, made payments to parties not entitled thereto, some by order of the trustee, and some to the executrix of the obligee, without such order: Held, that the obligor was not respon-

sible to the *cestui qui trust* for the former, but was liable to repay the latter. *Roberts v. Lloyd*, 376
 See CHARITY, 2, 3. COSTS, 4. MUNICIPAL CORPORATIONS. FLEADING, 2. TRUSTEE, 2.

C

CANAL SHARES.
 See SPECIFIC LEGACY.

CANONRY.

A canon of Windsor granted the canonry and the profits, &c., to the plaintiffs to secure a sum of money. So far as it appeared on an interlocutory application, the estates were vested in the corporation, and the canon was entitled to an aliquot share of the profits. There was no cure of souls, and the only duties were residence within the castle, and attendance in the chapel twenty-one days a year: Held, upon this state of circumstances, that the security was valid, and a receiver of the profits was appointed.

Principles of public policy, on which pay, pensions, &c., are held unalienable. *Grenfell v. The Dean and Canons of Windsor*, 544

CHARGE ON SEPARATE ESTATE.

See HUSBAND AND WIFE, 1. SEPARATE USE.

CHARITY.

1. In every case where the general purpose of a gift or conveyance is declared to be a charity, and the particular payments do not exhaust the whole fund, any surplus will belong to the charity, unless there are other circumstances from which a contrary intention of the testator can be collected. *Attorney General v. The Drapers Company*, 508
2. Absolute alienation and a reversionary lease of charity property set aside as improvident. *Attorney General v. Kerr*, 420
3. A fund was raised by voluntary subscription by the inhabitants of Lewes and its neighborhood, and applied in the purchase of premises for making a pest house, and the trusts were declared accordingly. In 1808 the trustees, under a resolution of the inhabitants at a general meeting, sold the premises, and lent the produce to the commissioners of lighting and paying on the security of the rates. Neither the principal nor interest having ever been repaid: Held, upon an information by the Attorney General, that this was a charitable foundation; that a breach of trust had been committed; and that the money ought now to be repaid by the commissioners out of the rates, though by the act empowering the commissioners to raise money on the rates one-twentieth of the principal was to be paid off annually. *The Attorney General v. Kell*, 575
4. A testator in whom real estates were vested, subject to certain rent charges, devised them to the Fishmongers' Company, "in aid of the maintenance of the poor men and women of the mystery and community aforesaid forever;" being precisely the same terms as those under which, by their charter, the company were licensed to hold land in mortmain: Held, under the circumstances, that the testator was a mere trustee for the company; and an information being filed against the company, to carry into execution the charitable trusts mentioned in the testator's will, was dismissed with costs. *Attorney General v. The Fishmongers Company*, 588
5. A chartered company became entitled by a devise to them, in the terms of their charter, contained in the will of one of their body, to property, subject to rent charges which were devoted to superstitious uses principally under the will of Sir J. C. In 1437, Sir J. C.'s executors of their good grace, zeal and love which they had unto the soul of Sir J. C., and to the intent that his will might be better observed, paid to the company 400 marks in recompense of the great charge and cost the company had borne in reparations of the land out of which the rent charge was issuing, so that the will of Sir J. C. might be observed and kept in time coming. In 1547, the statute against superstitious uses passed, and three years after the company purchased the rent charges of the crown, which were conveyed by letters patent; subsequently, in the 4th Jac. 1, an act of Parliament passed, whereby, to remove doubts and questions, it was enacted that all messuages, rents, &c., as had been theretofore devised to the company and which were mentioned in the letters patent might be thereafter held by the company against the king, saving the rights of persons other than the king. The company have ever since been in possession of the property, and had dealt with it as their general property, but had applied part of the rents in charity. In an information filed in 1832, insisting that the property was devoted to charity under the devise: Held, that at this distance of time any thing which seemed ambiguous ought to be presumed in favor of the company; that the testator was a mere trustee for the company; that it ought to be presumed that charges to which the crown became entitled, and which were granted to the company, were equal to, if they did not exceed, the whole value of the land; and that under the grant and statute the estates themselves became the property of the company. *The Attorney General v. The Fishmongers' Company*, 588
5. This court has authority to exercise a discretion in charity cases; and where it appears that the prosecution of accounts and inquiries would not be beneficial but prejudicial to the interests of the charity, the court will refuse them. The court also discourages long and expensive litigation in charity cases for matters of small value. *The Attorney General v. Shearman*, 104
6. A testator bequeathed 1000*l.* to "the Jews poor, Mile End;" there were two charitable institutions for poor Jews at Mile End, and it not appearing which of the charities were meant, Held, that the fund ought to be applied *cypres*; and the court divided the bequest between these two charitable institutions. *Bennet v. Hayter*, 81

7. Bequest of residue to a company, to apply the interest of a moiety "unto the redemption of British slaves in Turkey or Barbary," one-fourth to charity schools in London and its suburbs, and in consideration of the care and pains of the company, the remaining one-fourth towards necessitated decayed freemen of the company. There were no such British slaves to redeem; and a reference was made to the Master to approve of a scheme for the application of the fund thus unapplied, having regard to all the charitable bequests in the will: Held, that the application of the fund to the education of the British emancipated apprenticed negroes was not a *cy-pres* application; secondly, that the gift to the freemen of the company was a charitable bequest; and thirdly, there being no direct objects to which the income could be applied, regard being had to the bequest touching British captives, that the application of the fund to the second and third purposes was as near as could be to the intention of the testator, having regard to all the charitable bequests in the will.

Principles on which the court proceeds in the application of a charity fund *cy-pres*. *Attorney General v. The Ironmongers Company*, 313

See ATTORNEY GENERAL. BEQUEST, 1. GRAMMAR SCHOOL. LASTING IMPROVEMENTS. MORTGAGE. MORTMAIN. SUPERSTITIOUS USES.

CHARTER.

See CORPORATION.

CLERK IN COURT.

A clerk in court, who acted both for the plaintiff and defendants, applied to the plaintiff's solicitor for the names of commissioners to take the defendants' answer: Held, that this must be considered as a step taken by him on behalf of the defendants, although it was sworn that no instructions had been given by the defendants to the clerk in court for preparing a commission, and that such application, if any, had been made by him in the character of clerk in court of the plaintiffs. *Beavan v. Waterhouse*, 58

CO-DEFENDANTS.

A suit was instituted by a party entitled in remainder, against a trustee, to make him responsible for a trust fund invested on an improper security, and a decree was made for its restitution: Held, that in this suit the tenant for life, who was a defendant, was not entitled against his co-defendant, the trustee, to an account of the interest which had accrued pending the suit, there being no such case made by the pleadings. *Goodwin v. Clewley*, 30

COMMITMENT.

See CONTEMPT.

COMPANY.

See CORPORATION.

COMPENSATION.

See LASTING IMPROVEMENTS.

COMPOSITION DEED.

See DESTOR AND CREDITOR.

COMPROMISE.

See AGREEMENT, 1.

CONDITION.

A testator gave one estate to James, upon trust to pay to testator's wife 18l. a year for life, and after her decease he gave the estate to Thomas. The testator also gave a second estate to James, upon trust to pay testator's wife 28l. a year for life, and after her decease he gave this estate absolutely to James; and he declared, that if James should neglect or refuse to pay the annuities from either of the said estates when they became due, that his wife should have power of selling the estates and to appropriate the money to her own use. The rents being insufficient to pay the annuities: Held, that the widow had a right to sell unless James paid the full amount of the annuities, but that he was not personally bound to pay them. *Button v. Button*, 256

CONDITIONS OF SALE.

A sale was made by a mortgagee under a power, subject to certain special conditions (stated in the text): Held, that they were not of such a depreciating character as to invalidate the sale.

All objections to a title were to be taken within twenty-one days from the delivery of the abstract, or be deemed waived, and time was, in that respect, to be considered the essence of the contract: Held, that the twenty-one days did not begin to run until a perfect abstract had been delivered. *Hobson v. Bell*, 17

CONSTRUCTION.

See BEQUEST, *passim*. CUMULATIVE LEGACY. DEED, CONSTRUCTION OF. DEVISE. DYING WITHOUT ISSUE. ESTATE FOR LIFE. GENERAL ORDERS, 1, 2. LAWFUL ISSUE. MAINTENANCE AND ADVANCEMENT. MORTMAIN. MUNICIPAL CORPORATIONS. PERISHABLE PROPERTY, 1, 2, 4. REMOTENESS, 1, 2. SEPARATE ESTATE. SPECIFIC LEGACY, 1, 2. STATUTES. TRUST. TRUSTEE.

CONTRACT.

See AGREEMENT. CONDITIONS OF SALE. INTEREST, 1. INTERNATIONAL LAW. VENDOR AND PURCHASER, 6.

CONTEMPT.

1. Pending proceedings in this court, attacks on the plaintiff and his witnesses were published, representing those proceedings as vexatious, and that the witnesses had in their evidence been guilty of perjury: Held, that this being calculated to disturb the free course of justice,

was a contempt of court. *Littler v. Thomson*, 129

2. An order was made on a person, not a party to the cause, for payment of a sum of money within three weeks from the date of the order, but it was not served until after the expiration of that time: Held, irregular, and the subsequent proceedings to a commitment were set aside.

Mode of enforcing payment of a sum of money under an order of the court against one not a party to the cause. *Duffield v. Elwes*, 268
See PLEA. WRIT OF EXECUTION.

CONVERSION.

See MORTMAIN. PERISHABLE PROPERTY, 1, 2, 3.
PLEADING, 2.

COPYRIGHT.

A work consisting partly of compilations and selections from former works and partly of original compositions may be the subject of copyright.

The defendant having published a book consisting of matter pirated from the plaintiff's work, intermixed with original matter, the court, without waiting till the whole of the pirated parts could be ascertained, enjoined the defendant from publishing his book containing any articles pirated from the plaintiff's work. *Lewis v. Fullarton*, 6

CORPORATION.

Four projectors of a public company obtained a charter, by which they and all persons who might become subscribers were incorporated. The capital was declared to be 20,000*l.*, which was to be divided into 400 shares. Before any other subscribers had joined, the four projectors, of common assent, divided the 400 shares among themselves, accounting to the corporation (as was alleged) for 12,000*l.* and not 20,000*l.* They afterwards disposed of the shares. A bill being subsequently filed by the corporation against the projectors, impeaching the transaction, and to compel them to pay the full consideration: Held, that though at the time they were the only persons interested in the company, yet it was not competent for them to take the shares without paying the full consideration.

On a bill by an incorporated company against the four projectors of it, to compel them to account to the company for the value of shares which they had appropriated to themselves, without, as was alleged, having paid the full consideration: Held, that the individual shareholders need not be made parties.

Distinction between a corporation and the aggregate of the members forming such corporation. *The Society of Practical Knowledge v. Abbott*, 559

COSTS.

1. Where a party is served with a petition or notice of motion, he is not bound to take upon himself the responsibility of deciding whether

his interest in the matter is such as to render it unnecessary for him to appear; and he will not be deprived of the costs of his appearance, on the ground that he is not interested in the matter.

A promise by a party to make no opposition to an application intended to be made by another, is not, of itself, a sufficient ground for refusing him the costs of his appearance. *Bamford v. Watts*, 201

2. Where several persons are made defendants in respect of a joint fiduciary character only, or if any beneficial interest which they may have does not conflict with their duty, they ought not to sever in their defences, otherwise one set of costs only will be allowed them. *Gaunt v. Taylor*, 346
 3. Defendants admitted by their answer, that all persons interested were parties to the suit, and at the hearing objected for want of parties, and the objection prevailed: Held, that having misled the plaintiff, they ought to pay him the costs of the day. *Price v. Barrington*, 285
 4. A trustee guilty of a breach of trust, allowed the general costs of an administration suit as between solicitor and client, but was ordered to pay so much as had been occasioned by his breach of trust. *Pride v. Fooks*, 430
 5. A plaintiff partially succeeded, so as to be entitled to costs; but he failed in establishing unfounded charges of fraud, for the costs of which, the court considered him liable. The court made a decree without costs on either side. *Cullingsworth v. Lloyd*, 385
- See DEMURRER INFANT, 1, 2. MUNICIPAL CORPORATIONS. OFFICIAL ASSIGNEE. PAUPER, 1, 2, 3. PLEA. SHORT CAUSE. SOLICITOR AND CLIENT, 1, 2, 4, 5, 6, 7. SPECIFIC PERFORMANCE. STAYING PROCEEDINGS. VENDOR AND PURCHASER, 1, 6.

COVENANT TO SETTLE.

See DEED, CONSTRUCTION OF. SEPARATE ESTATE.

CREDITOR'S SUIT.

In 1811, a creditor's suit was instituted by a simple contract creditor; the answers were got in in 1820, the plaintiff's debt was admitted, and thereupon the assets were brought into court; in 1823, another simple contract creditor obtained judgment against the executors, no decree was made in the cause until 1829: Held, that the judgment thus obtained had priority over all the simple contract debts. *Larkins v. Paxton*, 219

See STAYING PROCEEDINGS.

CROSS EXAMINATION.

See EVIDENCE, 2.

CUMULATIVE LEGACY.

1. A testator bequeathed to Mrs. L. Pitney an annuity of 150*l.*, payable half-yearly, for her separate use. He afterwards wrote in the margin opposite this bequest, "New Mrs. J. Gray, one hundred guineas per annum in quarterly payments." Mrs. L. Pitney had married a

Mr. Gray prior to the date of the will: Held, that the annuities were substitutional, and that the legatee was entitled to an annuity of 100 guineas for her separate use. *Martin v. Drinkwater*, 215

2. Where a testator makes distinct gifts by distinct codicils the presumption is, that the subsequent gifts are additional, and that the testator, when he made the last had not forgotten the former, and did not mean to make the last either in vain or in substitution for the former; but this presumption may be strengthened or rebutted by any circumstances which, by just inference and presumption, may enable the court to ascertain the real intention of the testator. The nature of the legacies and the extent of interest in them which is given are very material circumstances, but the court also regards the situation of the testator with respect to the persons for whom he is making provision, and the other directions which he may have given.

A legacy of 5000*l.*, subject to be divested if the legatee should die before attaining twenty-one or marriage, would not be considered as a repetition of or substitution for two legacies of 1000*l.* and 4000*l.* not subject to be so divested and given by a subsequent codicil.

By the first codicil, the testator gave to his illegitimate daughter Phillis an annuity of 100*l.* a year and a sum of 1000*l.*, with a power to the trustees to advance 250*l.* for her benefit. By the second codicil the testator merely revoked the appointment of a trustee. By his third codicil he gave Phillis a debt of 1546*l.* sterling, a legacy of 1000*l.* and one of 4000*l.* when his estates were cleared of all present demands on them. By a fifth codicil he charged two estates with 5000*l.* each for his illegitimate daughters Phillis and Sybil, to be divested on their dying under twenty-one or before marriage. By a subsequent codicil he confirmed his will and the second codicil, (which varied the trustees only,) and also (though inaccurately describing it) the fifth codicil; and after reciting that he had by one or both of the codicils to his said will in a sufficient manner provided for Phillis, he gave to his illegitimate daughters Sybil and Clara an estate similar in all respects to that which by his said codicil or codicils he had given to his said other daughter, and he declared that Sybil and Clara should have the same provision as he had made for his other daughter: Held, that the legacies were not cumulative, and that the daughters were entitled to the provision made by the fifth codicil only. *Robely v. Robely*, 95

CY-PRES.

See CHARITY, 6, 7.

D

DAMAGES.

See VENDOR AND PURCHASER, 1, 2.

DEBT.

See BEQUEST, 9.

DEBTOR AND CREDITOR.

Upon a composition between the debtor and his creditors, a creditor cannot ostensibly accept a composition and sign the deed which expresses his acceptance of the terms and at the same time stipulate for or secure to himself a peculiar and separate advantage which is not expressed upon the deed.

A creditor holding a security for his debt may stipulate to have the benefit of it in addition to the amount of the composition offered by a debtor to his creditors; but he must either hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject if he at all acts in common with them.

A debtor entered into a negotiation for a compromise with his creditors, but there did not appear to have been any general meeting of them, or any agreement entered into by them generally. One of the creditors stipulated that he should have the benefit of a mortgage security which he held, in addition to the amount of composition. He accepted the composition, but did not then execute the composition deed; he afterwards realized his mortgage security, and then executed the composition deed, by which he purported to release his debtor altogether, without any reservation of the mortgage security; another creditor subsequently executed the composition deed. The agreement was not communicated to the other creditors, but there was no fraudulent concealment: Held, on grounds of public policy, that the creditor was not entitled to retain his mortgage security in addition to the amount of the composition. *Cullingworth v. Lloyd*, 385

DECLARATIONS.

See EVIDENCE, 4. POWER OF SALE.

DECREE.

Form of a decree in a foreclosure suit, where A., whose estate was already mortgaged to the plaintiff, joined B., as his surety, in a mortgage to the plaintiff of both their estates for a further sum. *Aldworth v. Robinson*, 287

See CO-DEFENDANTS. INFANT, 3. LASTING IMPROVEMENTS. REVIVOR, BILL OF. TENANT IN TAIL.

DEED.

See CANONRY. HUSBAND AND WIFE. INQUIRY. INSOLVENT, 1. MERGER. SEPARATE ESTATE. SEPARATE USE.

DEED, CONSTRUCTION OF.

On the marriage of a lady, who was possessed of funded property and shares in water-works, the funded property alone was settled; the settlement, however, contained a recital of an intention, that all property which the wife, or her husband in her right, should after the marriage become entitled to, should be settled on similar trusts, and a covenant by the husband and by the wife, that all property which she

or her husband in her right, should after the settlement become entitled to should be settled : Held, that the shares were subject to the trusts of the settlement. *James v. Durant*, 177
See ASSIGNMENT. INSOLVENT, 1. RECTIFYING SETTLEMENT. SEPARATE ESTATE. SEPARATE USE.

DEMURRER.

After a demurrer, the plaintiff may, before it has been argued, obtain an order of course to amend; the only question is, what costs he is to pay, and that depends upon whether the demurrer has been set down or not. *Warburton v. The London and Blackwall Railway Company*, 253
See AGREEMENT, 2. CORPORATION. INJUNCTION, 1. INSOLVENT, 2.

DEPOSITIONS.

Depositions suppressed on the ground of interrogatories being intitled in one cause, in which a deceased defendant and her representatives were all stated to be defendants together. *Pritchard v. Foulkes*, 133
See INTERROGATORIES.

DEVISE.

A testator gave to his wife, for life only, all his freeholds, &c., as also his capital in trade for her life, but nevertheless in trust, at her death, "for his then surviving children, share and share alike, independent of the rental of his said estates," which he gave "to his surviving female children;" and he proceeded thus:—"On the decease of any of the children, should they die without issue, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, from the last female child to the males of my body:" Held, that the children of a daughter of the testator, who survived him but died in the life of the widow, took no interest under the will. *Wordsworth v. Wood*, 25
 2. The testator devised his residuary freehold, copyhold, and leasehold estates to his son and four daughters, "and their lawful issue respectively in tail general, with benefit of survivorship to and amongst their issue respectively, as tenants in common;" but such issue "being sons," not to have vested interests until they attained twenty-one, or "being daughters," until twenty-one or marriage; with power to the trustees, after the death of his son or daughters respectively, to advance such issue during minority, to the extent of one-half the presumptive share of "each child;" and in case his son or daughters or any or either of them should die without leaving lawful issue, or with lawful issue, and such issue, being a son or sons, should not attain twenty-one, or being a daughter or daughters, should not attain that age or be married, then the part or share of him or her so dying to be for the benefit of the survivors and their issue, in the same manner as their original shares: Held, that the

testator's children took estates for life, as tenants in common, in the freeholds and copyholds, with remainder to the grandchildren, in tail general, in the shares of their respective parents, with cross remainders in tail between such grandchildren respectively, and with remainder for life to the survivors or survivor, others or other of the parents, in equal shares for life, with remainder in tail to their children; the shares accruing to such survivors, &c., to be subject to the same limitations and such benefit of survivorship as the original shares. *Cursham v. Newland*, 145
See BEQUEST. CONDITION DYING WITHOUT ISSUE. LAWFUL ISSUE. MORTMAIN. SUPERSTITIOUS USES. TRUST, 1.

DYING WITHOUT ISSUE.

A testator gave the income of his personal, and the rents of his real estate, to his daughter for life, for her separate use, and after her decease and the decease of his wife, he gave the residue of his real and personal estate to trustees, in trust to sell and pay half the produce "to the issue" of his daughter, equally, to be paid at twenty-one; and if only one child, then to such one child; and he directed the trustees to apply the interest in the maintenance and education of such issue; "and in default of such issue" he gave such moiety of the residue between his nephews and nieces living at the death of his daughter. And he gave and devised the other moiety of the residue of his estate, at the decease of his wife and his daughter without issue, to the same trustees, to permit his godson to receive the income for life, and after his decease to certain charities: Held, that "issue" in the first clause was to be construed "children;" but in the second clause in its ordinary unrestricted sense; and that consequently the gift over of the first moiety, upon the death of the daughter without issue, was good, but was too remote as to the second.

The word "issue" in a will, held on the context to have two different meanings as to two moieties of a devised estate. *Carter v. Bentall*, 551

E

ECCLESIASTICAL COURT.

See RECEIVER, 2.

ECCLESIASTICAL PREFERMENT.

See CANONRY.

ENQUIRY.

See EXECUTOR. PLEADING, 1.

ESTATE FOR LIFE.

Bequest of money and leaseholds to a feme sole "for her own absolute use, without liberty to sell or assign during her life:" Held, that she took the property absolutely, without power of

disposition during her life. *Baker v. Newton.*
Newton v. Richards, 112

See REMOTENESS, 1.

ESTATE TAIL.

See TRUST, 1.

EVIDENCE.

1. An *ex parte* order for the examination, *de bene esse*, of a witness "in her seventieth year, and very weak and infirm, and from her advanced years not likely to live long," discharged for irregularity, on the ground that she did not come within the rule, not being "seventy years of age," and not being in a "dangerous state of health."

Ex parte order for the examination, *de bene esse*, of a soldier under military orders to proceed abroad in about six days for six or seven years, held regular. *M'Kenna v. Everitt,* 188

2. Cross examination of a witness in equity, to prove exhibits, held no waiver of objection to his competency on the ground of interest; but *semble*, that the proposition is not true that a witness may be cross examined to any extent and for any purpose, without waiving the objection to his competency on the ground of interest. *Frank v. Mainwaring,* 127
3. In a suit to set aside deeds, on the ground that their execution had been procured from a person while a lunatic, a trustee, who was alleged to have assisted in procuring their execution, though for no personal advantage, was held an incompetent witness on behalf of the parties taking beneficially under the deeds. Held, also, that the wife of the trustee was equally incompetent. *Frank v. Mainwaring,* 126
4. Where a purchase is made by a parent in the name of a child, the contemporaneous acts and declarations of the parent are evidence to show that the child shall take as trustee only; but the subsequent acts and declarations of the parent are inadmissible for that purpose. *Sidmouth v. Sidmouth,* 447

See AFFIDAVIT. EXTRINSIC EVIDENCE. HUSBAND AND WIFE, 2. INQUISITION. POWER OF SALE. RECTIFYING SETTLEMENT. VENDOR AND PURCHASER, 4. VOLUNTARY SETTLEMENT.

EXCEPTIONS.

Exceptions to an answer for insufficiency will not fail on account of their not following literally the words of the interrogatory, provided the variation be not important. *Brown v. Keating,* 581

See REPORT, MASTER'S.

EXECUTION.

See INJUNCTION, 3.

EXECUTOR.

A testator, a victualler, directed his trade to be carried on by his executors a brewer, and spirit merchant, who had been in the habit of serving him in his lifetime, and supplies were

furnished for that purpose by them. The court would not declare that the executors were entitled to receive the cost price only for these supplies; but directed an inquiry whether the supplies were proper, and furnished at the ordinary market price. *Smith v. Langford,* 362

See ADMISSION OF ASSETS. BREACH OF TRUST, 1. PAUPER, 2. SETTLED ACCOUNT. TRUSTEE, 2.

EXTRINSIC EVIDENCE.

Extrinsic evidence is admissible to show the circumstances of the testator at the time of making his will, so as to enable the court to place itself in the situation of the testator; but it is inadmissible to prove either his motives or intentions. *Martin v. Drinkwater,* 215

F

FAMILY.

See INSOLVENT, 1.

FEME COVERT.

See HUSBAND AND WIFE. MAINTENANCE AND ADVANCEMENT. SEPARATE ESTATE. SEPARATE USE.

FOREIGN CONTRACT.

See INTERNATIONAL LAW.

FOREIGN COURT.

See JURISDICTION.

FORECLOSURE.

See DECREE. MORTGAGE, 2.

FORMA PAUPERIS.

See PAUPER, *passim*.

FRAUD.

See CORPORATION. HUSBAND AND WIFE, 2. PRODUCTION OF DOCUMENTS, 4. SETTLED ACCOUNT. SOLICITOR AND CLIENT, 3. VOLUNTARY SETTLEMENT.

FURTHER DIRECTIONS.

See PLEADING, 2. REPORT, MASTER'S.

G

GENERAL ORDERS.

1. A plaintiff submitted to a demurrer, and obtained an order of course to amend, undertaking to amend within three weeks; he did not comply with the undertaking, but after the expiration of the three weeks obtained a second order of course to amend upon similar terms. No answer having been filed: Held, that the second order was not irregular. *Nicholson v. Peile,* 497
2. Whether, by the 12th general order, (1828,) the Master can extend the time for making his report more than once, *quere*. *Davis v. Franklin,* 369

See STOP ORDER.

GIFT OVER.

See BEQUEST 2.

GRAMMAR SCHOOL.

The trustees of a free grammar school, whose origin did not appear, held property "to the use of the school." Having elected a schoolmaster, they obliged him to enter into a bond and agreement stipulating that he should not have or claim a freehold in the school, or estates; and should quit at six months' notice, and should not intermeddle with the estates, with certain other stipulations as to the government and management of the school: Held, that the trustees had exceeded their powers. *In re the Royston Free Grammar School*, 228

H

HEIR AT LAW.

See MORTMAIN.

HUSBAND AND WIFE.

1. By a deed, which represented the wife to have the dominion over the fee of an estate, by means of a power the wife appointed and the husband and wife conveyed the fee by way of mortgage. The estate was really settled to the separate use of the wife for life, with remainder to the husband for life, with remainders over. The mortgage money was decreed to be raised out of the life estates. *Wainwright v. Hardisty*, 363
2. If a woman entitled to property, during the treaty for marriage, represents to her intended husband that she is so entitled, that upon the marriage he will become entitled *jure mariti*, and if during the same treaty she clandestinely conveys away the property in such manner as to defeat his marital right, and secure to herself the separate use of it, and the concealment continues until the marriage, a fraud is thus practised on the husband, and he is entitled to relief.

Direct misrepresentations, or wilful concealment with intent to deceive the husband, would entitle him to such relief; and if both the property and the mode of its conveyance pending the marriage treaty be concealed from the intended husband, there is still a fraud practised on him; cases have, however, occurred in which concealment, or rather the non-existence of communication to the husband, has not been held fraudulent; and whether fraud is made out must depend on the circumstances of each case.

As a conveyance made immediately before her marriage is *prima facie* good, it is to be impeached only by the proof of fraud.

In August a widow, having a second marriage in contemplation, settled her property on herself for life, for her separate use, with remainder to the children of her first marriage, and in October following she married. The settlement was prepared by her direction, without the privity or assent "of her then intended

husband." In a suit to carry the settlement into execution, the second husband insisted on the settlement being a fraud on his marital rights, but it was not proved that in August he was "the intended husband:" Held, that the evidence was insufficient to impeach the deed. *England v. Downs*, 522

See AGREEMENT, 2. SEPARATE ESTATE. SEPARATE USE. SOLICITOR AND CLIENT, 2.

I

IMPERTINENCE.

A defendant, after having appeared to an amended bill, obtained an order for the delivery out of court of his papers to enable him to prepare his answer, and after the time for answering had expired applied to the plaintiff for names of commissioners to join in taking his answer: Held, that he could not afterwards refer the bill for impertinence. *Beavan v. Waterhouse*, 58

IMPLICATION.

See BEQUEST, 6.

INCUMBRANCE.

See VENDOR AND PURCHASER, 7.

INFANT.

1. Suit improperly instituted on behalf of an infant, dismissed with costs on motion, upon the application of the infant by A. B., a person not then a party to the suit, "as her next friend for the purpose of the application." *Guy v. Guy*, 460
2. Bill filed by two infants; one attained twenty-one before decree; her name as co-plaintiff struck out on her application, with the costs of the application. *Guy v. Guy*, 460
3. Minutes of decree directed conveyance to be settled by Master, "if the parties differed," there being an infant heir who was a party to the cause and a necessary party to the conveyance: Held, that the words "if the parties differed" ought to be omitted, an infant being interested. *Calvert v. Godfrey*, 267
4. The court declined taking the consent of a married woman, who was a minor, to the payment out of court of money to which she was entitled. *Stubbs v. Sargon*, 496
See PLEADING, 1.

INFORMATION.

See ATTORNEY GENERAL.

INJUNCTION.

1. The plaintiffs obtained a special injunction, and the defendants subsequently filed a general demurrer, after which, and before the demurrer had been set down, the plaintiff obtained an order of course to amend, "without prejudice to the injunction:" Held, regular. *Warburton v. The London and Blackwall Railway Company*, 253

2. On dismissal of bill an injunction fails of course. *Green v. Puleford*, 70
3. An answer filed on the morning on which a motion is made to extend the common injunction is not sufficient to prevent its being extended.

A bill stated that judgment had been obtained at law, and prayed an injunction to stay execution; the court of law afterwards set aside the judgment, and let in the defendant at law to plead; a motion being made to extend the common injunction to stay trial was, under these circumstances refused. *Thompson v. Byrom*, 15

4. It is not necessary that the common injunction for want of appearance should be obtained in term or during the seal, it may be regularly obtained any day on which the court is sitting. *The Earl of Chesterfield v. Bond*, 263

See BANKRUPT. COPYRIGHT. JURISDICTION. SUPPLEMENTAL BILL.

INQUISITION.

On a bill to set aside deeds and recoveries, on the ground of the lunacy of the party at the time he executed them: Held, that the finding of the jury on an inquisition, which overreached that period, afforded a presumption that he was then insane; but there being some evidence, that after the time when the lunacy was stated to have commenced the party was not of unsound mind, an issue was directed to inquire whether he was of unsound mind at the time of executing the deeds, &c. *Frank v. Mainwaring*, 115

INSOLVENT.

1. Property was settled on J. R. by his father, until he should take the benefit of the insolvent debtors' act, and then the trustees were during his life to apply it in such manner and to such persons, *for the board, lodging and subsistence of J. R. and his family*, as the trustees should think proper; and after his decease, upon trust for such persons as J. R. should appoint, and in default of appointment in trust for his children. J. R. took the benefit of the insolvent debtors' act: he had three children, but his wife was dead: Held, that his children, who were all infants, became entitled to three-fourths and the assignees to one-fourth of the life interest of J. R. *Rippon v. Norton*, 63
2. In May, 1819, a party took the benefit of the insolvent act then in force; he subsequently acquired property, and died leaving more than sufficient to pay his debts contracted after his insolvency. The scheduled creditors remaining unpaid: Held, that a bill might be maintained by one of such creditors against the personal representatives of the insolvent, without the previous sanction of the Insolvent Debtors' Court, for payment, out of the surplus assets, of the scheduled debts. *Ward v. Painter*, 85

See PAUPER, 2. PLEADING, 1. VOLUNTARY SETTLEMENT.

INTEREST.

1. The defendant wrote to his receiver and professional agent as follows: "If you will remit the 400*l*. I can give you a note for it when you come to London." The money was advanced, but no note was signed: Held, that a special contract must be inferred, and that interest was payable by the defendant. *Rhodes v. Lord Selsey*, 359
 2. A. B., on whose estate the plaintiff had a charge for principal and interest, being desirous of paying it instead of having it raised out of the estate, was ordered to pay it into court by a given day. He made default, and applied for an extension of the time, which was granted: Held, that the plaintiff was not entitled to subsequent interest on the aggregate of principal and interest due, but on the principal only. *Wilkinson v. Charlesworth*, 470
- See CO DEFENDANTS INTERNATIONAL LAW.

INTERNATIONAL LAW.

A bill of exchange was drawn and accepted in Paris, and made payable in England. The drawer and acceptor were living there. No rate of interest was expressed to be payable on the bill: Held, that the default being made in England, interest was payable according to the English and not the French law.

As to contracts merely personal, it is a general rule, that questions relating to the validity and to the interpretation of a contract are to be governed by the law of the country where the contract was made; and if a remedy for non-performance of a contract is sought in another country, the mode of suing and the time within which the action must be brought are to be governed by the law of the country in which the action is brought. *Cooper v. The Earl of Waldegrave*, 282

INTERROGATORIES.

A petition for a commission to examine witnesses, and the order thereon, obtained by consent, were intituled in an original and revived suit, but the interrogatories were intituled in the original cause only: Held, that the interrogatories were wrongly intituled, and the depositions were suppressed. *Pritchard v. Foulkes*, 133

See DEPOSITIONS. EXCEPTIONS.

ISSUE.

See DYING WITHOUT ISSUE. LAWFUL ISSUE.

J

JUDGMENT.

A court of equity has no jurisdiction under the 1 & 2 Vict. c. 110, s. 14, to order moneys invested in the name of the Accountant General to stand charged with a judgment debt recovered at law against the party entitled to such funds. *Miles v. Presland*, 300

See CREDITOR'S SUIT. INJUNCTION, 3.

JURISDICTION.

After decree the court has jurisdiction, at the instance of a defendant to enjoin the plaintiff from proceeding in another court in respect of the same matter.

After decree here, the plaintiff cannot, except by leave of the court, proceed in another court in respect of the same matter, even though such proceedings are merely auxiliary. *Wedderburn v. Wedderburn*, 208

See AWARD. BANKRUPT. GRAMMAR SCHOOL INSOLVENT DEBTOR, 2. RECTIFYING SETTLEMENT. SOLICITOR AND CLIENT, 3. VENDOR AND PURCHASER, 1, 2.

LACHES.

Under a trust deed dated in 1806 and which was to operate during the life of the grantor, the trustee, after the performance of certain trusts, was to pay the surplus rents to the owner during his life. The owner died in 1816, the trustee died in 1818, and in 1828 a bill for an account was filed by the representative of the former against the representatives of the latter. The answer was filed in the following year, but no farther proceedings were taken in the suit until 1839, when the cause was set down and was heard in 1840; Held, that no such laches existed as to bar the account: Held also, that, as regarded the lapse of time, the case was to be looked at in the same light now as at the filing of the bill. *Dickenson v. Lord Holland*, 310

See CREDITOR'S SUIT.

LAPSED LEGACY.

See BEQUEST, 8.

LASTING IMPROVEMENTS.

A lessee of charity property obtained a further reversionary term, and afterwards made considerable lasting improvements on the property; the reversionary lease being set aside, the court considered the lessee entitled to compensation for money laid out by him in reference to the extended enjoyment. *Attorney General v. Kerr*, 420

LAWFUL ISSUE.

The words "lawful issue" in a devise to four parents and their "lawful issue respectively, in tail general," without benefit of survivorship to and amongst their issue respectively, as tenants in common, held, upon the context of a will, to be words of purchase, and not of limitation. *Cursham v. Newland*, 145

See TRUST.

LEASEHOLDS.

See PERISHABLE PROPERTY, 2.

LEGACY.

See BEQUEST. CUMULATIVE LEGACY. PERISHABLE PROPERTY. SPECIFIC LEGACY.

LEGAL REPRESENTATIVES.

Bequest to A. or his legal representatives. A. was dead at the date of the testator's will, having bequeathed his property on particular trusts: Held, that A.'s next of kin, according to the statute of distributions, were entitled to the fund. *Cotton v. Cotton*, 67

LIMITATION.

See DEVISE. DYING WITHOUT ISSUE. ESTATE FOR LIFE. LAWFUL ISSUE. REMOTENESS.

LIS PENDENS.

See RECEIVER, 2.

LONG ANNUITIES.

See PERISHABLE PROPERTY, 1. PLEADING, 2.

LUNACY.

See EVIDENCE, 3. INQUISITION.

M

MAINTENANCE AND ADVANCEMENT.

Property was directed by will to be accumulated for such children as A. B. and C. should leave at their deaths; with power to the trustee to to apply such part of the income, as in his judgment might be proper, for their education and maintenance during their minority, and for their future advancement in life: Held, as to a daughter of C., that the power for maintenance did not cease on her marriage, but that it ceased on her attaining twenty-one: and as to the power of advancement, that it continued, notwithstanding she had attained twenty-one and had married, and notwithstanding the period for accumulation limited by the Thellusson act had expired. *Pride v. Fooks*, 430

MERGER.

Valid lease of charity property which had merged in the fee by an invalid absolute conveyance to the lessee, sustained on setting aside the latter on an information by the Attorney General. *Attorney General v. Kerr*, 420

MINES.

See TENANT FOR LIFE AND REMAINDER MAN.

MISJOINDER.

A person may maintain a suit as sole plaintiff, though uniting in himself several characters, having distinct conflicting rights in the subject of a suit; but the court will not in a suit so constituted decide on the conflicting rights vested in the plaintiff, and by its decree will make provision for the protection of the defendants from any prejudice which may arise from the peculiar constitution of the suit. *Blease v. Burgh*, 221

MISTAKE.

See HUSBAND AND WIFE, 1. RECTIFYING SETTLEMENT.

MORTGAGE.

1. Two parties, who were entitled to property in equal moieties, made an equitable mortgage of it; one of the mortgagors was out of the jurisdiction, and the whole rents were received by the other. The court granted a receiver *Holmes v. Bell*, 298

2. In a foreclosure suit, an order to enlarge the time for payment of the mortgage money is by no means of course, but may be refused where no excuse for the default is stated, and the security does not appear to be ample.

The usual condition on which it is granted is, on payment of interest and costs before the time appointed by the Master for payment of the whole; in this case, however, it was ordered, that upon payment of the interest and costs within a month, the time should be enlarged for five months. *Eyre v. Hanson*, 478

See DECREE. HUSBAND AND WIFE, 1. TRUSTEE, 1.

MORTGAGEE.

See CONDITIONS OF SALE. POWER OF SALE.

MORTMAIN.

A testator gave his real and personal estate to trustees, upon trust with all convenient speed to convert into money; and he directed them, at the end of twelve months after his decease, to invest the sum of 600*l.* out of his *personal estate*, in trust for a charity; he also directed them, at the end of twelve months after his decease (*all his property being personal*), to lay out the residue for other charities. The realty was sold: Held, that the 600*l.* was not payable out of pure personalty, but out of the mixed fund; and that this gift and the gift of the residue were rendered void by the mortmain act, in the proportion which the realty bore to the personalty: Held also, that the realty was not converted to all intents, so as to entitle the next of kin to the fund released, in consequence of the invalidity of the gift of the real estate to charity. *Johnson v. Woods*, 409

MOTION.

See INFANT, 1. SHORT CAUSE. STAYING PROCEEDINGS. SUPPLEMENTAL ANSWER. SUPPLEMENTAL BILL.

MUNICIPAL CORPORATIONS.

Municipal corporations, as altered by the municipal corporation act (5 & 6 W. 4, c. 76.) are but a continuance of the old corporations; and where the new corporation was made party to a suit, in respect of a breach of trust committed by their predecessors, it was held they were not entitled to costs. *Attorney General v. Kerr*, 490

N

NEXT FRIEND.

See INFANT, 1.

NEXT OF KIN.

See LEGAL REPRESENTATIVES. MORTMAIN.

NOTICE.

See BREACH OF TRUST, 2. VENDOR AND PURCHASER, 5, 7.

O

OBLIGOR AND OBLIGEE.

See BREACH OF TRUST, 2.

OFFICIAL ASSIGNEE.

The official assignee of a defaulting trustee whose assets had been distributed held not entitled to costs. *Williams v. Nixon*, 472

P

PARENT AND CHILD.

See ADVANCEMENT. INSOLVENT, 1. TRUST, 2.

PARTIES.

See COSTS, 3. PLEADING, 3.

PARTITION.

Four persons purchased some land and agreed that it should be laid out in streets and sold in lots according to a specified plan. All the parties died, and there being no equitable ground for putting an end to the agreement: Held, that the representatives of one of the parties could not maintain a suit for a partition against the representatives of the others. *Peck v. Cardwell*, 137

PARTNERSHIP.

See PRODUCTION OF DOCUMENTS, 4.

PAUPER.

1. Party suing in *forma pauperis* and proving successful, declared entitled to ordinary costs. *Roberts v. Lloyd*, 376
2. A defendant, who was the executor and residuary legatee, obtained an order to sue in *forma pauperis*; having afterwards taken the benefit of the insolvent act, he was dispaupered, on the ground that he was then defending in his representative character only. *Oldfield v. Cobbett*, 444
3. Defendant dispaupered, with the costs of the application, on affidavits, which were not wholly contradicted by the defendant, showing that he was not in bad circumstances. *Romilly v. Grint*, 186

PAYMENT OUT OF COURT.

Where small sums are payable out of court to parties, an order will be made to pay them to the solicitor, he undertaking to distribute them; but it is necessary either that the petition praying payment to the solicitor should be signed by the parties, or that a written authority, signed by the parties, should be produced

to the court, authorizing the payment to the solicitor. *Kelsall v. Minton*. 361
See INFANT, 4.

PERISHABLE PROPERTY.

1. A testator possessing long annuities and money in different funds bequeathed the residue of his estate to A. for life, and after her death he gave certain stock legacies and whatever there might remain, to B.: Held, that the long annuities ought to be converted for the benefit of the parties in remainder. *Lichfield v. Baker*, 481
2. A testator gave the residue of his estate and effects to trustees, to permit the *rents*, interest and annual proceeds to be received by A. for life, and after his decease to C. and D. when they attained twenty-one, with power, after the death of A., to apply the *rents*, &c. towards the maintenance of C. and D. until their shares should become vested. Part of the residue consisted of leaseholds: Held, that the tenant for life was entitled to enjoy them in specie, and that they were not to be converted for the benefit of those in remainder. *Goodenough v. Tremamonda*, 512
3. A testator bequeathed to his widow "all the interest, rents, dividends, annual produce and profits, use and enjoyment of all his, the testator's, real and personal estate" for life, and at her decease he gave to E. R. P. "all the rest and residue of his estate and effects whatsoever, both real and personal." Held, on the context of the will, that the widow was entitled to the enjoyment, during life, of the perishable property of the testator "in specie," and without a conversion for the benefit of the remainder man. *Pickering v. Pickering*, 31
See PLEADING, 2.

PIRACY.

See COPYRIGHT.

PLEA.

After an attachment for want of answer, it is irregular to file a plea without first tendering the costs of the contempt. *Foulkes v. Jones*, 274

PLEADING.

1. A bill alleged that the settlor at the time of making a voluntary settlement was greatly indebted; it did not state the particulars of the debts, but referred to a schedule of the settlor in the Insolvent Court in aid of the suit: Held, that the existence of the debts was not sufficiently put in issue as against an infant, but an inquiry was directed on the point. *Townsend v. Westacott*. 340
2. A perishable fund was for some time wrongfully enjoyed in *specie* by the tenant for life; the remainder man filed a bill for an account, and to ascertain the residue. Before filing the bill, the plaintiff had notice that part of the residue consisted of long annuities, and he was again informed of that fact by the answer; but

he made no objection thereto, either by the original or the amended bill, and at the hearing the common decree for an account was made. The Master declined entering into the question of the right of the tenant for life to enjoy the long annuities, but he stated the fact on his report. The report was confirmed, and by consent no exceptions were taken: Held, on further directions, that the long annuities must then be converted into consols; but the court refused to make the widow account for her prior receipts. *Lichfield v. Baker*, 481

3. One of the thirty-eight proprietors of a newspaper was appointed book-keeper, and received the moneys of the concern; a bill being filed against him for an account, &c. by twelve of the proprietors on behalf, &c.: Held, that the remaining twenty-five were necessary parties. *Bainbridge and others v. Burton*, 539
See Co-DEFENDANTS. COSTS, 3. MISJOINDER. REVIVOR, BILL OF. SUPPLEMENTAL BILL.

POSSESSION.

See VENDOR AND PURCHASER, 3.

POWER, EXECUTION OF.

A testator gave his residuary property to two trustees for his children, except John, who had misconducted himself; but the testator trusted his conduct would change, and he gave *his trustees and the survivors of them*, and the executors and administrators of such survivor, power to give to John an equal share with his brothers and sisters. He appointed the two trustees executors, and by a codicil appointed a third executor; one alone proved the will, and the others renounced. In a state of facts brought into the Master's office, the sole executor and trustee stated that John had conducted himself to his satisfaction, and in such a manner as to entitle him to an equal share: Held, that the sole executor had power to appoint, and had well appointed a share to John. *Eaton v. Smith*, 236

POWER OF SALE.

A mortgagee had a power of sale in case of default being made in payment of mortgage money: Held, that the unsupported solemn declaration, under the 5 & 6 W. 4, c. 62, of the mortgagee alone, of a default having been made, was not sufficient evidence of that fact, as between vendor and purchaser. *Hobson v. Bell*, 17

See CONDITION.

PRACTICE.

See ACQUIESCENCE. AFFIDAVIT. ANSWER. APPEARANCE. ARBITRATION. CLERK IN COURT. CONTEMPT, 2. COSTS, *passim*. DEMURRER. DEPOSITIONS. EVIDENCE, 1, 2, 3. EXCEPTIONS. GENERAL ORDERS. IMPERTINENCE. INFANT, *passim*. INJUNCTION, *passim*. INTEREST, 2. INTERROGATORIES. JURISDICTION. LACHES. MISJOINDER. MORTGAGE, 1, 2. PAUPER, 2. PAYMENT OUT OF COURT. PLEA.

PRODUCTION OF DOCUMENTS, 1, 2, 4. RECEIVER, 1, 2. REPORT, MASTER'S. SECURITY FOR COSTS. SERVICE OF WARRANTS. SHORT CAUSE. SOLICITOR AND CLIENT, 6. STAYING PROCEEDINGS. STOP ORDER. SUBPENA, 1, 2, 3. SUPPLEMENTAL ANSWER. SUPPLEMENTAL BILL. VENDOR AND PURCHASER, 3. WRIT OF EXECUTION.

PRAYERS FOR THE DEAD.

See SUPERSTITIOUS USES.

PRESUMPTION.

See CHARITY, 4. INQUISITION. TRUST, 2.

PRIORITY.

See ADMINISTRATION SUIT. CREDITORS' SUIT.

PRIVILEGE.

See PRODUCTION OF DOCUMENTS, 3.

PRIVY COUNCIL.

See RECEIVER, 2.

PRODUCTION OF DOCUMENTS.

1. A defendant, by his answer, stated that he had handed over some documents relating to the matters in question to his agent in Jamaica, to enable him to defend a suit there; that the agent had left the island, and that the documents had been taken possession of by a receiver appointed by the Court of Chancery there: Held, that this admission entitled the plaintiff for an order for production; but liberty was given to the defendant to relieve himself, if possible, by affidavit, from the effects of this admission. *Morrice v. Swaby*, 500
2. A defendant, who in his answer refers to a deed in the words, "as by the said indenture, when produced, will appear," must produce it for the inspection, &c. of the plaintiff, although he does not "crave leave to refer to it." *Welford v. Stainthorpe*, 587
3. Necessary communications between a solicitor and client, through an unprofessional person, are privileged; but it not appearing in this case that the communications were wholly of a professional or confidential nature, such privilege was disallowed.

A case submitted since the institution of the suit, for the opinion of Dutch counsel and the opinion thereon, held privileged. *Bunbury v. Bunbury*, 173

4. By articles of partnership, in case of the death of a partner the survivor was to pay the amount of his capital according to the last half-yearly rest, and to take the stock, &c. After the death of one, a different arrangement was entered into between his executors (one of whom was the surviving partner,) and his widow, who was beneficially interested under the will, by which the surviving partner was to take the stock at a valuation, and get in the credits, and pay the joint debts, and out of the share of the deceased partner in the surplus, to pay his separate debts and the widow's legacy. The widow by this bill sought to set aside this arrangement for fraud, and to have an account of the partnership transactions, and of the pro-

fits subsequent to her husband's death: Held, that the plaintiff was entitled to the production of the accounts of the business, as carried on after the testator's death. *Hue v. Richards*, 305

PUBLIC POLICY

See CANONRY. DEBTOR AND CREDITOR. SOLICITOR AND CLIENT, 3.

PURCHASE, WORDS OF.

See LIMITATION.

R

RECEIVER.

1. The allowance to a receiver appointed by the court depends on the degree of difficulty or facility experienced in the collection. There is no general rule as to the amount.

The report of the Master allowing to the receiver a gross salary of 5 per cent. on considerable receipts, composed of large sums due for mortgages, annuities, rents, &c. referred back for review. *Day v. Croft*, 488

2. An appeal was pending in the Privy Council from a sentence of the Ecclesiastical Court rejecting the testamentary papers of the deceased and declaring an intestacy; limited administration *pendente lite* had ceased by the sentence, and an inhibition had issued from the Privy Council which inhibited the Ecclesiastical Court proceeding. There being no person in the mean time authorized to protect and collect the estate: Held, that these circumstances, alone, justified the appointment of a receiver by this court.

Held also, that a receiver might in such case be granted on the application of a party appellant, who, assuming the decision of the Ecclesiastical Court to be correct, had no interest in the estate of the deceased.

And thirdly, that the circumstance of there being no person in whose name an action might be brought to recover the property is not a sufficient objection to the appointment of a receiver. *Wood v. Hitchings*, 289

See CANONRY. MORTGAGE, 1. SUPPLEMENTAL BILL.

RECTIFYING SETTLEMENT.

On the 6th of June, upon a contemplated marriage, the lady's father proposed during his life to allow his daughter 200*l.* a year, to continue if she died in her father's life leaving children; but if she died in his lifetime without issue, then 100*l.* to the husband during the father's life. The father, in a letter to his solicitor, also stated that he wished the husband to have 150*l.* a year in the event of his daughter's death without issue; the proposal was agreed to, and a settlement prepared and executed, dated the 8th of July, whereby the father covenanted, during his life, to pay an annuity of 200*l.* to the husband and his assigns. The husband died insolvent, leaving his wife and three children. After his death, the set-

tlement was rectified upon the production of the proposals, and the evidence of the solicitor who prepared the settlement, that he had prepared the settlement from the proposals which he thought he had carried into execution; and the wife was declared entitled to the annuity as against the husband's representatives. *Pearce v. Verbeke*, 333

REFERENCE TO ARBITRATION.

See ARBITRATION.

RELATOR.

See ATTORNEY GENERAL.

REMAINDER MAN.

See TENANT FOR LIFE.

REMOTENESS.

1. Bequest to testator's wife for life, and after her death to make a division between the testator's four children, A. B. C. and D.; his sons' shares to be paid immediately, and his daughters' shares to be invested for them for life, with remainder between all their children, to become vested at the age of twenty-five, with a gift over to the children of the others who should live to attain the age of twenty-five in case either daughter should die without leaving any child who should live to attain twenty-five; with powers for the maintenance and advancement of such children. Held, that the gift over was too remote; and secondly, that the gift to the daughters in the first instance being absolute, and the attempt to limit it having failed, the absolute interest remained unaffected, so that the representatives of a daughter who died without children were entitled to her one-fourth share. *Ring v. Hurdwick*, 352
2. A testator gave her residuary estate to trustees to accumulate, and to stand possessed thereof and of the accumulations, in trust for all the children of J. B., other than A., and to be paid on attaining twenty-three, with a gift over in the event of the death of all the said children under twenty-three. J. B. had three children, A., B. and C., of whom A. and B. were born in the lifetime of the testatrix, and C. three years after her death. B. died an infant, and C., who was also B.'s personal representative, attained twenty-three: Held, first, that the legacy was vested; and the gift being to a class, and C. having come into *esse* before the period of distribution, the court considered that C. was not excluded from taking under the residuary gift, and that in his own right and as representing B. he was entitled to the whole fund. *Blease v. Burgh*, 221
See DYING WITHOUT ISSUE.

REPORT, MASTER'S.

The Master's report had been confirmed, and neither objection nor exception had been taken thereto. The cause came on for further directions, when the court, from the facts stated in the report, entertaining great doubt as to the correctness of the Master's finding, declined

to act upon it, though it refused then to alter it. *Gregory v. West*, 541
See GENERAL ORDERS, 2.

RETAINER.

See SOLICITOR AND CLIENT, 5.

REVIVOR, BILL OF.

One decree was taken in several suits. An abatement afterwards occurred: Held, that one bill of revivor was sufficient. *Moore v. Elkington*, 574

RULE IN SHELLEY'S CASE.

See ISSUE. LAWFUL ISSUE.

S

SCHEDULE.

See ASSIGNMENT. PLEADING, 1.

SECURITY FOR COSTS.

A plaintiff being ordered to pay costs went abroad (as was sworn upon belief and not denied) permanently and to avoid payment: he was ordered to give security for costs, and the proceedings in the suit were in the mean time stayed. *Bush v. Beetham*, 537

SEPARATE ESTATE.

In a marriage settlement the husband alone covenanted to settle any property which his wife, or he in her right, might thereafter acquire: Held, that property which was afterwards given to the wife for her separate use was not affected by the covenant. *Travers v. Travers*, 179

See HUSBAND AND WIFE, 1.

SEPARATE USE.

Freeholds were conveyed by lease and release, to trustees to the use of a *feme covert* for her separate use for life, or to the use of such person as she should by writing, sealed, &c. appoint, and in default of appointment in trust to pay the rents to her for her separate use. The husband and wife by writing not under seal, for valuable consideration, undertook to execute a mortgage of the property when required. The husband died, and no mortgage had been executed: Held, that the agreement was binding upon the surviving wife. *Stead v. Nelson*, 245

See HUSBAND AND WIFE, 1.

SERVICE OF ORDER.

See CONTEMPT, 2.

SERVICE OF WARRANTS.

Receiver's accounts were passed in the Master's office in the absence of the executor, the warrants having been regularly served on his clerk in court but not having been forwarded to him. The court, under the circumstances, remitted the matter to the Master's office, to give the

executor an opportunity of stating his objections to the accounts. *Oldfield v. Cobbett*, 444

SETTLED ACCOUNT.

An account between an aged tenant for life and the remainder man (who was also executor,) which was settled and signed by the tenant for life under the advice of her solicitor, set aside, on the ground of the executor not having furnished full information, of the account being founded on an erroneous opinion of counsel as to the rights of the parties, obtained *ex parte* by the executor, and of the account being complicated in its form, and though professing to be made in conformity with the opinion, yet containing an addition of a purchase and sale between the parties. *Pickering v. Pickering*, 31

SETTLEMENT.

See DEED, CONSTRUCTION OF. HUSBAND AND WIFE, 2. INSOLVENT, 1. RECTIFYING SETTLEMENT. SEPARATE ESTATE. VOLUNTARY SETTLEMENT.

SEVERANCE OF DEFENCES.

See COURTS, 2.

SHAREHOLDERS.

See CORPORATION.

SHORT CAUSE.

An application to the Master of the Rolls, on the certificate of plaintiff's counsel, to advance a cause as a short cause, was refused on the defendant's counsel stating that it was not a short cause, and the costs of the motion were reserved. The cause afterwards came on in its regular course, when the court, being of opinion that the cause was a proper one to be heard as a short cause, gave to the plaintiff the costs of the motion. *Aldworth v. Robinson*, 287

SOLICITOR AND CLIENT.

1. This court has authority to refer for taxation the bill of costs of a solicitor who acts as agent for another. *Toghill v. Grant*, 261
2. A husband became liable for bills of costs due from his wife, *dum sola*, and from her former husband, to a solicitor: Held, that though the relation of solicitor and client did not exist between the solicitor and the second husband, yet that the latter was entitled to a taxation of the bills of costs.

A bill of costs, nearly the whole of which had been paid, contained items unconnected with professional employment, as for a horse, &c.: Held, that the solicitor ought, in taxation, to have credit for such items (if due,) although they had not become due to him in the character of solicitor. *Waring v. Williams*, 1

3. Signification of the term "*undue influence*," as applied to transactions between solicitor and client.

There are transactions in which there is so great an inequality between the transacting parties,—so much of habitual exercise of power on the one side, and habitual submission on the other, that without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this Court will impute an exercise of undue influence.

When undue influence is to be inferred from the nature of the transaction, or when the transaction is contrary to the policy of law, it is the province of the court to determine the point; and the question ought not to be sent to a jury. *Casborne v. Barsham*, 76

4. After demurrer allowed, the plaintiff's solicitor refused to proceed until payment of his bill: Held, that he was bound to deliver over the papers to the new solicitor of the plaintiff on the usual undertaking as to lien and redelivery, but that the party ought, under the circumstances, to undertake to prosecute the suit with due diligence. *Cane v. Martin*, 584

5. The retainer of a solicitor need not be in writing, but if he neglects taking that precaution, and his retainer being afterwards questioned there is nothing but assertion against assertion, he must bear the costs of the risk he thus undertakes. *Wiggins v. Peppin*, 403

6. A motion for the taxation of a solicitor's bill, with special directions to disallow the costs of certain proceedings alleged to have been improperly taken by the solicitor, or with a qualification that the taxation was to be of the costs of such proceedings only as had been properly incurred, refused, as such objections may be taken advantage of under the common order for a taxation. *Wiggins v. Peppin*, 403

7. Business relating to a trust estate was transacted by two solicitors in partnership, one of whom was a trustee of the estate: Held, in passing his accounts, that costs out of pocket could alone be allowed. *Collins v. Carey*, 128

See PAYMENT OUT OF COURT. PRODUCTION OF DOCUMENTS, 3.

SPECIFIC LEGACY.

1. A testator having fifteen and a half Leeds and Liverpool canal shares, which by act of Parliament were to be deemed personal estate, bequeathed five and a half such canal shares to A., five such shares to B., and five such shares to C. There was no description or reference in the will to show that the testator intended to give the particular shares which he held at the date of his will: At his death he possessed no Leeds and Liverpool canal shares: Held, that the legacies were general, and not specific.

A canal was made under the authority of an act of parliament, the lands for that purpose were purchased and vested in a corporation, but the shares therein were to be deemed to be personal estate and transmissible as such, and were to be conveyed by bargain and sale: Held, that the shares did not bear the cha-

racter of realty, so as to make a bequest of them specific. *Robinson v. Addison*, 515

2. A testator bequeathed as many of his canal shares as he should leave children him surviving, one of such shares to be in trust for each of his children. At the date of his will he had eight shares and seven children, and at his death he had ten shares and eleven children: Held, that the bequest was specific. *Miller v. Little*, 229

SPECIFIC PERFORMANCE.

A bill prayed the specific performance of an agreement, "if a good title could be made." At the hearing it was declared that the agreement ought to be specifically performed, and it was referred to the Master to inquire whether a good title could be made. The Master reported in the negative. The plaintiff on further directions waived all objections to the title, and proposed to take the property; this was resisted by the vendor: Held, that the plaintiff was entitled; but being aware, at the first hearing, of the objections to the title, he ought to pay the costs of the investigation in the Master's office. *Bennett v. Fowler*, 302

See TURNPIKE ACT. VENDOR AND PURCHASER, l, 5, 6.

STATUTES, CONSTRUCTION OF.

- 1 Ed. 6, c. 1. See Superstitious Uses.
- 1 Ed. 6, c. 14. See Superstitious Uses.
- 13 Eliz. c. 5. See Voluntary Settlement.
- 4 Jas. 1. See Superstitious Uses.
- 39 & 40 G. 3, c. 98. See Maintenance and Advancement. *Thellusson Act*.
- 3 G. 4, c. 126. See Turnpike Act.
- 4 & 5 W. 4, c. 82. See Appearance. *Subpoena*, 2.
- 5 & 6 W. 4, c. 76. See Municipal Corporations.
- 1 & 2 Vic. c. 110, s. 8. See Bankrupt, s. 14. See Judgment.

STAYING PROCEEDINGS.

Where a debt is claimed or a demand made in a suit, and the defendant, admitting his liability, offers to pay the debt or comply with the demand and to put the plaintiff in the same situation as he would have been in if the liability had been satisfied without suit, the court, on motion, will stay all further proceedings.

Proceedings in a creditor's suit stayed as against some defendants on payment of one of the plaintiffs' debts, on which alone the defendants applying were liable, and, under very special circumstances, without costs. *Holden and Mellish v. Kynaston*, 204

See SECURITY FOR COSTS

STOP ORDER.

1. Parties obtaining stop orders to be liable at the discretion of the court to pay costs. See General Order, Ap. 3, 1841.
2. Stop orders may be obtained without service

of the petition upon the parties to the cause, or upon persons interested in parts of the funds not sought to be affected. See General Order, Ap. 3, 1841. xi

SUBPOENA.

1. An order for service of a subpoena to appear and answer upon the defendant's partners at the house of business, the defendant himself being abroad, held, under the circumstances, to be regular. *Kinder v. Forbes*, 503
2. Service abroad of a subpoena to appear, ordered under the 4 & 5 W. 4, c. 82, in a case where English funds were alleged to have been improperly sold out and invested in Austrian stock and Dutch and Portuguese bonds. *Dodd v. Webber*, 502
3. Service of a subpoena by leaving a copy at the defendant's residence sealed up in a letter, at the same time producing the original, held regular. *The Earl of Chesterfield v. Bond*, 263

SUBSTITUTED SERVICE.

See SUBPOENA, l.

SUPERSTITIOUS USES.

Establishments or foundations for securing prayers for the souls of the dead are deemed to be superstitious, and within the statute of 1 Edw. 6, c. 14.

The court (without deciding whether directions to pray for the souls of the dead were or not unlawful, or prohibited by the church of England,) held, that it might be properly deemed superstitious to create an establishment, or endow a foundation, to be continued in perpetuity and conducted with certain ceremonies supposed to be religious, for the purpose of securing the perpetual continuance of prayers for the souls of the dead, either alone or in connection with other observances, within the express terms of the 1 Edw. 6, c. 14.

A testator, who died in the year 1529, devised lands in the city of London to the Fishmongers Company, to the intent that they should perform his will in manner after declared. He then provided for obits and anniversaries, without limiting any term within which the expenses thereof should be confined, and he willed that the company should provide four honest priests, studying in the universities, to pray for his soul there, paying to every one of them 4*l.*, quarterly; he next directed the company to provide thirteen poor men and women, being in poverty, to pray specially for his soul, &c., and he provided for a perpetual succession of such poor persons, and he directed the company to pay them 8*d.* weekly, and the poor persons were to attend the anniversaries or obits, and he made other similar bequests. The statute of 1 Edw. 6, c. 1, afterwards passed, and the Crown subsequently, for valuable consideration, by letters patent granted to trustees of the company a rent of 53*s.* 4*d.* a year issuing out of the lands, being the annual rent lately payable in respect of the testator's two anniversaries (without

mentioning any other rents.) By a subsequent statute of 4 Jac. 1, all the lands, &c. mentioned in the letters patent of Edward VI. were secured, as against the king and his successors, to the companies, saving the rights of any person other than the king: Held, that the bequests to pray for souls were superstitious under the statute of 1 Edw. 6, and that under the letters patent and act of parliament the company were entitled beneficially, discharged of any trust. *Attorney General v. The Fishmongers Company*, 151

SUPPLEMENTAL ANSWER.

A notice of motion for liberty to file a supplemental answer should specify the new facts intended to be introduced, and a notice of motion for liberty to file a supplemental answer stating "certain facts" not regular. *Haslar v. Hollis*, 236

SUPPLEMENTAL BILL.

The priorities of incumbrancers upon an estate were declared, and a receiver appointed with directions to keep down the incumbrances in a suit to which the first incumbrancer was not a party. The first incumbrancer filed a bill against the receiver and the several parties to the former suit, to establish his priority, and praying "that if necessary the second bill might be taken as supplemental to the first." The plaintiff in the second suit moved for an injunction to restrain the receiver from making any further payments to the other incumbrancers: Held irregular, and that he ought to have applied in the first suit for leave to enforce his legal remedies: Held also, that the court would not on this occasion determine whether this was to be taken as a supplemental bill. *Smith v. The Earl of Effingham*, 232

See VENDOR AND PURCHASER, 2.

"SURVIVOR," CONSTRUED "OTHERS."

See DEVISE, 2.

SURVIVORSHIP.

See DEVISE, 2.

T

TAXATION.

See SOLICITOR AND CLIENT, 1, 2, 6, 7.

TENANT FOR LIFE AND REMAINDER MAN.

A tenant for life has no right to open mines or clay-pits; but where the author of the settlement has previously worked them, the tenant for life may continue.

Whether a tenant for life can work mines or clay-pits, the working of which had been abandoned by the author of the settlement, *quære?* *Viner v. Vaughan*, 466
See Co-DEFENDANTS. HUSBAND AND WIFE, 1.

PERISHABLE PROPERTY, 1, 2, 3. PLEADING, 2. SETTLED ACCOUNT.

TENANT IN TAIL.

A decree directing the owner of a legal estate to do such acts as are requisite to bar the estate tail, but which are incomplete at his death, is not binding on the succeeding issue in tail. *Frank v. Mainwaring*, 115
See TRUST.

THELLUSSON ACT.

Where a testator directs the accumulation of a fund to commence at a time subsequent to his decease, the accumulation becomes void at the expiration of twenty-one years from his decease, although at that period there has been on the whole less than twenty-one years of accumulation.

A testator gave annuities to A. and B. respectively, charged on money in the funds; and he directed that when either died, the annuity should accumulate until the death of the survivor. A. died some time after the testator; B. being still living: Held, that the accumulation must cease at the expiration of twenty-one years from the testator's decease, and not from twenty-one years from the decease of A. *Webb v. Webb*, 493

See MAINTENANCE AND ADVANCEMENT.

TIME OF PAYMENT.

See BEQUEST, 3.

TITLE.

See CONDITIONS OF SALE. VENDOR AND PURCHASER, 3, 5, 6, 7.

TRUST.

1. A testator gave his real and personal estate to his wife for life, and after her decease "unto and amongst his three children, P., E. and T., and their lawful issue, in such proportions, manner and form, and subject to such charges, &c., as his wife should appoint:" Held, that in default of appointment, the children took estates tail, and that an appointment to a deceased child and the heirs of her body was invalid. *Martin v. Swannell*, 249
2. When property is purchased by a parent in the name of his child it is *prima facie* an advancement; the implied trust in favor of the person paying the money does not in such case arise. This presumption may, however, be rebutted by evidence, manifesting an intention that the child shall take as trustee. *Sidmouth v. Sidmouth*, 447
See SUPERSTITIOUS USES.

TRUSTEE.

1. A. B. C. and D. purchased land on a joint speculation; and they agreed, in case either of them should sell his share, to give to the others the option of buying. A. and B. paid the whole purchase money, and C. and D. mortgaged their shares to A. and B. to secure

their proportions. D. died, and made A. C. and W. executors and trustees, and gave them power to sell but no power to make purchases. A. and B., who alone proved the will, together with W., agreed to relinquish to C. a portion of the estate, in consideration of C.'s releasing to them his share in the residue, subject to his mortgage debt thereon. W. died, and A. and B. afterwards completed the contract: Held, that as there was no power given to the executors and trustees of D. to purchase, or to render the testator's estate liable to a portion of C.'s mortgage, the estate of D. was not entitled to participate in the benefit of the purchase. *Peck v. Cardwell*, 137

2. A trustee, who was directed by the will of the testator to invest the residue in consols, and to accumulate the dividends, invested it on mortgage of real estate: he was held liable to make good the amount of stock which would have been purchased in consols, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock. *Pride v. Fooks*, 430

See BREACH OF TRUST, 1, 2. CHARITY, 3, 4. CO-DEFENDANTS. COSTS, 2, 4, EXECUTOR. GRAMMAR SCHOOL. INSOLVENT. LACHES. SOLICITOR AND CLIENT, 7. VENDOR AND PURCHASER, 7.

TURNPIKE ACT.

By the general turnpike act, the trustees are empowered to let the tolls by auction; but amongst other provisions to prevent undue preference, a minute glass is to be turned thrice after each bidding: and it is declared, that if no other person bids, the last bidder is to be the farmer or renter. Trustees under this act put up tolls subject to other conditions, one of which was, that unless there should be three biddings there should be no letting, unless the trustees thought proper to take less than three biddings, and that the trustees should have a reserved bidding. There was one bidding only, which was made by the plaintiff, whereupon the trustees declared, that if there was no advance they should be obliged to make a reserved bidding. The minute glass was turned thrice, and there was no further bidding. The plaintiff insisted, that under the express terms of the act he was the purchaser, and he filed his bill for a specific performance: Held, that he was not entitled to relief, and the bill was dismissed, but without costs. *Levy v. Pendergrasse*, 415

U

UNCERTAINTY.

See BEQUEST, 5. CHARITY, 6.

UNDERTAKING.

See GENERAL ORDERS, 1.

UNDUE INFLUENCE.

See SOLICITOR AND CLIENT, 3.

V

VENDOR AND PURCHASER.

1. A. B., an attorney, representing himself to be authorized by the owners, entered into an agreement on their behalf, to sell a house to the plaintiff, and received a deposit. The plaintiff filed a bill against the owners and A. B. praying a specific performance, and in the alternative, that if the agreement could not be enforced against the owners, then that A. B. might repay the deposit and the costs incurred by the plaintiff and of the suit. It appeared at the hearing that A. B. had no authority to sell: Held, that the remedy of the plaintiff against A. B. being altogether at law could not be had in this suit, and the bill was dismissed with costs. *Sainsbury v. Jones*, 462
2. Remedy by supplemental bill, after a decree for specific performance, for the damages occasioned to the plaintiff by the abstraction by the defendant, *pendente lite*, of part of the subject matter of the suit. *Nelson v. Bridges*, 239
3. A purchaser under the court will not be allowed to take possession "without prejudice to objections to the title," even upon payment of his purchase money into court. *Hutton v. Mannell*, 260
4. The certificate of a stockbroker, of a fund standing in the bank, held insufficient evidence of that fact as between vendor and purchaser. *Hobson v. Bell*, 17
5. An estate was settled to the husband and wife successively for life, with remainder to their children as they should appoint, and in default of appointment between such children. The husband and wife encumbered their life interests, and in August the husband and wife, having seven children, appointed the whole estate to the eldest daughter; in October of the same year the husband, wife and daughter mortgaged the property for 8000*l*. The mortgagee, under the power of sale in the mortgage deed, sold the property to the plaintiff; and after the title had been approved of, one of the younger children gave notice to the plaintiff not to complete, and that the appointment was a fraud on the marriage settlement, and also cautioning the purchaser not to pay the purchase money; he did not, however, follow up the notice by any proceeding: Held, that notwithstanding this, a good title was shown, and that the purchaser must complete. *Green v. Puleford*, 70
6. Where time is not of the essence of the contract, and there is unnecessary delay by one of the parties in completing, the other has a right, by notice, to limit the time for completing the contract, and upon default to abandon the contract.
A bill was filed by a vendor for the specific performance of a contract: the purchaser insisted that the contract had been abandoned; failing in this defence, he was ordered to pay the costs of suit up to the hearing, and the usual reference was made as to title. *Taylor v. Brown*, 180
7. On a purchase from a mortgagee, of a fund

standing in the name of trustees, it is not an essential blot on the title, that notice of the incumbrance was not given to the trustees, if it can be shown that no subsequent incumbrancer has given notice.

Whether the title to a trust fund is bad, where, in consequence of the death of trustees, information cannot be obtained from them of the incumbrances of which they had received notice? *Quere. Hobson v. Bell*, 17
See CONDITIONS OF SALE. POWER OF SALE.
SPECIFIC PERFORMANCE.

VESTED INTEREST.

See REMOTENESS, 1, 2.

VOLUNTARY SETTLEMENT.

A party largely indebted made a voluntary settlement, and became insolvent within three years: Held sufficient to avoid the settlement under the 13 Eliz. c. 5; and held also, that in order to set it aside it was not necessary to prove that the settlor was in a state amounting to insolvency. *Townsend v. Westacott*, 340

See PLEADING, 1.

W

WILL.

See BEQUEST, *passim*. CUMULATIVE LEGACY, 1, 2. DEVISE. DYING WITHOUT ISSUE. EXTRINSIC EVIDENCE. LEGAL REPRESENTATIVES. LAWFUL ISSUE. MAINTENANCE AND ADVANCEMENT. PERISHABLE PROPERTY, 2. REMOTENESS, 1, 2. SPECIFIC LEGACY, 1, 2.

WRIT OF EXECUTION.

It is irregular to serve a writ of execution, commanding payment of money, after the expiration of the time appointed for payment in the order upon which the writ is founded. *Duffield v. Elwes*, 269

WAIVER.

See ACQUIESCENCE. IMPERTINENCE.

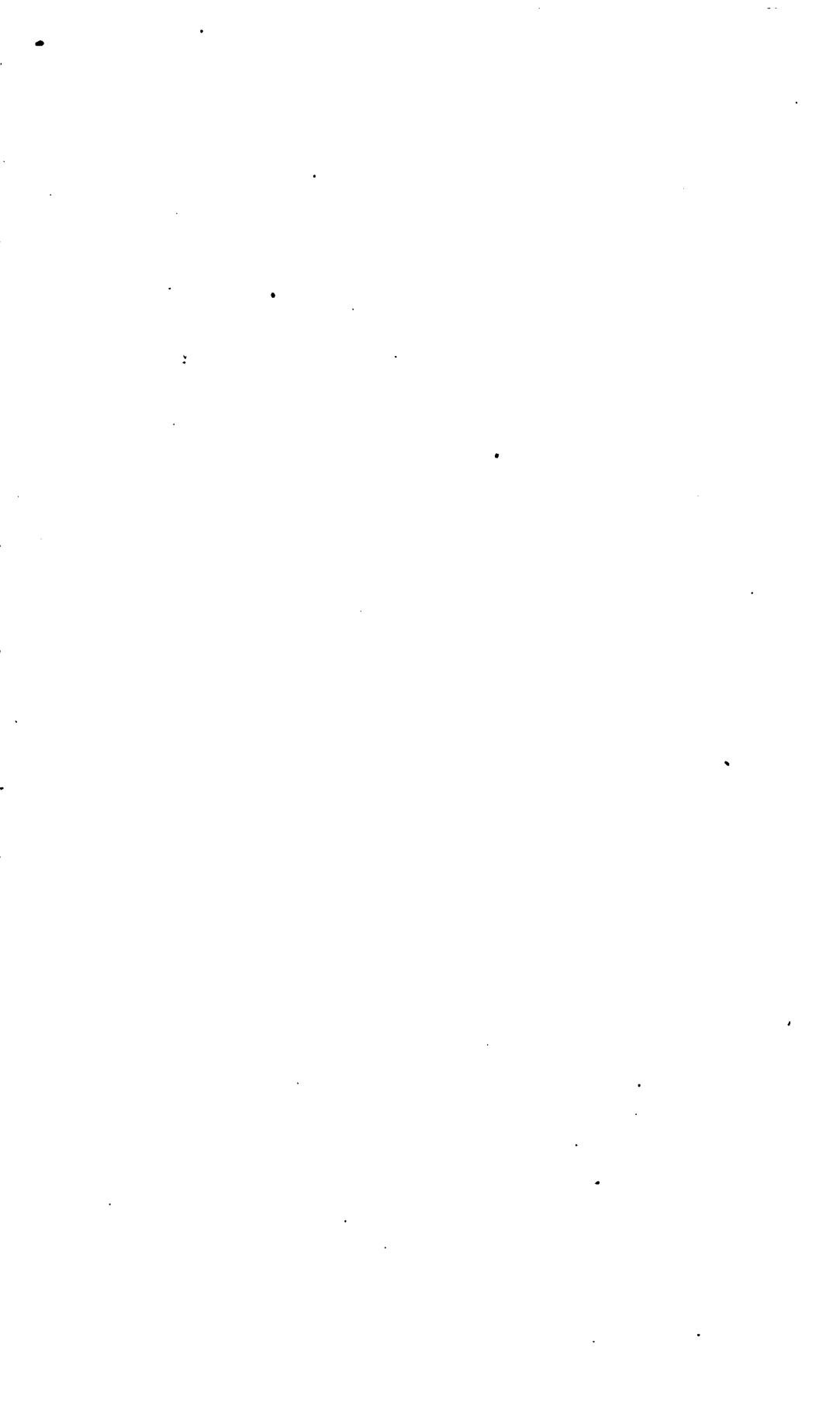
WITNESS.

See EVIDENCE, *passim*.

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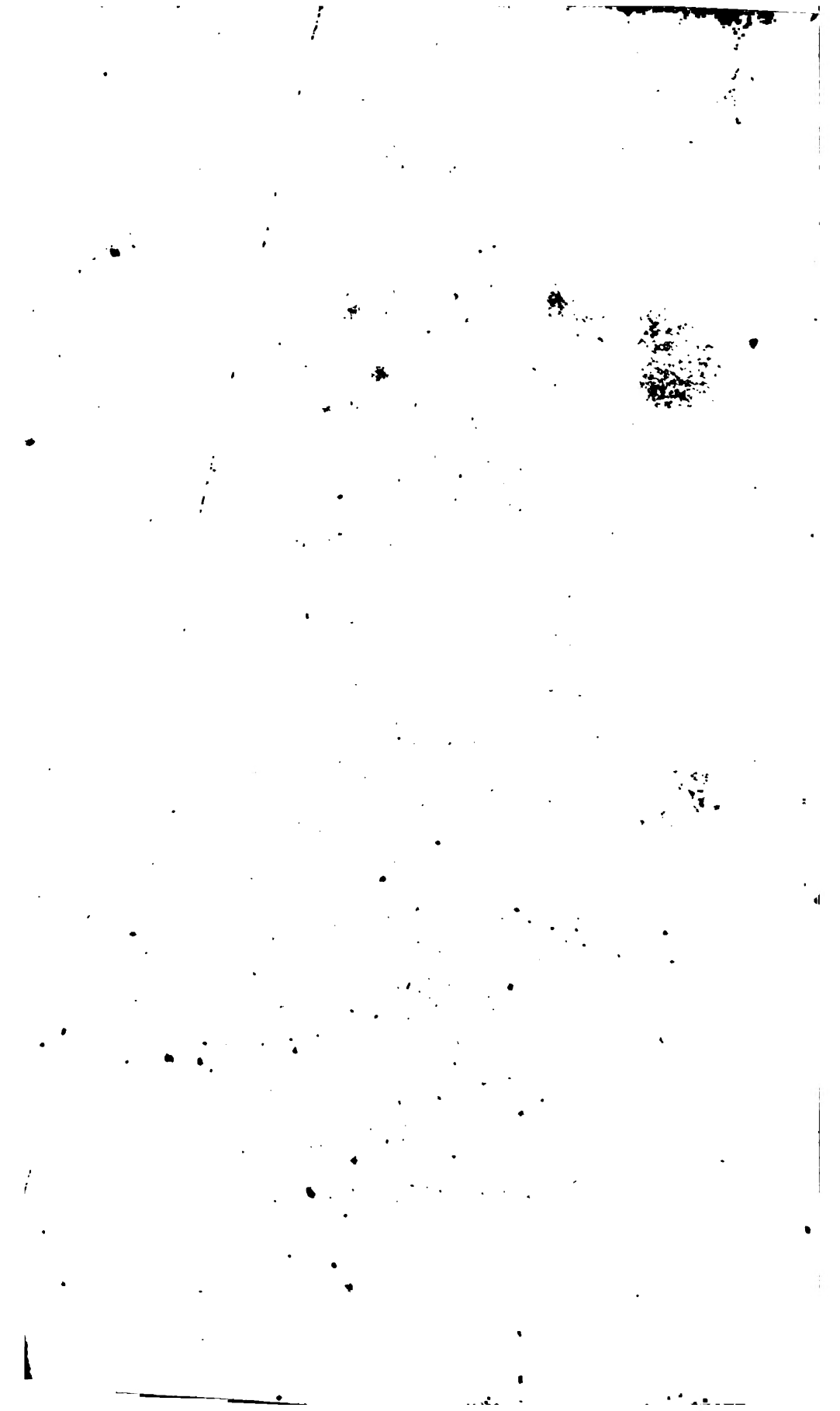












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